

EXHIBIT A

FILED UNDER SEAL

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE DISTRICT OF DELAWARE

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10X GENOMICS, INC., : CIVIL ACTION
Plaintiff, :
vs. :
CELSEE, INC., :
Defendant. : NO. 19-00862-CFC-SRF

- - -

Wilmington, Delaware
Thursday, November 5, 2020
9:30 o'clock, a.m.
***Telephone conference

- - -

BEFORE: HONORABLE COLM F. CONNOLLY, U.S.D.C.J.

- - -

APPEARANCES:

RICHARDS, LAYTON & FINGER
BY: JASON J. RAWNSLEY, ESQ. and
FREDERICK L. COTTRELL III, ESQ.

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-and-

Valerie J. Gunning
Official Court Reporter

1 **APPEARANCES (Continued) :**

2 **DURIE TANGRI**

3 **BY: DARALYN J. DURIE, ESQ.**
4 **EUGENE NOVIKOV, ESQ. and**
5 **DAVID F. MCGOWAN, ESQ.**
6 **(San Francisco, California)**

7 **Counsel for Plaintiff**

8 **FARNAN LLP**

9 **BY: BRIAN E. FARNAN, ESQ.**

10 **-and-**

11 **FOLEY HOAG LLP**

12 **BY: BARBARA A. FIACCO, ESQ. and**
13 **JEREMY A. YOUNKIN, ESQ.**
14 **(Boston, Massachusetts)**

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P R O C E E D I N G S

(The following telephone conference began at
9:30 a.m.)

THE COURT: All right. Can I have a roll call?
Let's hear from plaintiffs, please.

MR. RAWNSLEY: Good morning, Your Honor. This
is Jason Rawnsley of Richards Layton & Finger, and I'm also
joined by Fred Cottrell from Richards Layton for the
plaintiff.

Today we're joined by Dave McGowan, Daralyn
Durie and Gene Novikov of Durie Tangri, and with the
Court's permission, Mr. McGowan will be presenting the
argument.

THE COURT: Okay. Thank you very much. How
about from defendant?

MR. FARNAN: Good morning, Your Honor. Brian
Farnan on behalf of the defendant, and with me is Barbara
Fiacco and Jeremy Younkin from Foley Hoag, and Mr. Younkin
will be addressing the Court.

THE COURT: All right. Very good.

Before we begin, let me just give you some --
why I decided to have a call on this.

First of all, I think it's a very interesting

1 issue, and by issue, I mean the common interest issue. But
2 I'm very concerned this is really not teed up. I mean, I
3 think that that issue is complicated. I don't think there's
4 any binding precedent, and it just doesn't seem to be teed
5 up in a way that would permit me to make a really informed
6 decision about the scope of the common interest exception
7 under these facts. That is one issue.

8 The second issue is the way it was teed up, I
9 find it very confusing, because on one hand, the defendants
10 have expressly stated in their letter to the Magistrate that
11 they didn't want any attorney impressions. Basically, in
12 the footnote, as far as I'm concerned, they're basically
13 saying we don't want work product and yet they seem to be
14 pursuing work product.

15 And there's a footnote from 10X in its papers
16 where it does raise a relevance objection, but I don't know
17 that there was any kind of briefing or consideration in
18 front of the Magistrate about proportionality and relevance
19 and burden, so I want to hear about that.

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20 So I think both parties can be guided in their
21 arguments by what I've just shared. And then I would ask at
22 the outset from plaintiff to just tell me the status of
23 things. Was the deponent -- was there, in fact, a second
24 deposition? Where do things stand in terms of discovery in
25 the case generally? And so let's hear first then from the

1 plaintiff.

2 MR. MCGOWAN: Thank you, Your Honor. This is
3 David McGowan from Durie Tangri. I will try and take the
4 Court's guidance in I think reverse order.

5 Your first question was, is -- are the
6 plaintiffs seeking mental impressions as opposed to some
7 non-work product material. The distinction that's being
8 drawn that the Court references is between the merger
9 negotiation and between the work product and the types of
10 things that in these cases are considered work product,
11 which would be, for example, an opinion letter from the
12 underlying litigation was at issue in the Hewlett-Packard
13 case, but the distinction is between what were the attorneys
14 in the litigation thinking about and pondering inside their
15 heads and what the parties to the merger negotiations said
16 to each other across the table.

17 The across-the-table discussions we do not think
18 are work product under Rule 26 or any precedent and they're
19 also not deliberations that are inside the head. They're
20 statements in a negotiation.

21 If I might proceed stepwise and see if that
22 clarifies the scope for the Court.

23 THE COURT: Well, so I appreciate -- I mean,
24 frankly, the way you just kind of did it, I mean, that's the
25 way I do it, I think of it. I'm not sure your papers did

1 that in front of the Magistrate especially because of the
2 footnote you dropped.

3 And the way I looked at it is you had two
4 depositions. I read the papers last week, so I may get
5 something wrong here. But my recollection is the deposition
6 conducted by Ms. Durie, the questions went to what was put
7 into the data room, into the virtual data room. Is that
8 right?

9 MR. MCGOWAN: The question, the specific
10 question that was teed up is what were the considerations
11 that went to the holdback number with respect to the
12 instruction that they're citing.

13 THE COURT: Okay.

14 MR. MCGOWAN: So there are two different
15 questions, the Court is exactly right. And we are
16 proceeding in view of that distinction, I think, in Exhibit
17 D, Mr. Starks' deposition, the question that led to the
18 instruction the defendant cites in its footnote, in its
19 papers to this Court, that what were the considerations that
20 led to the holdback number and there was an objection on

21 work product and privilege ground.

22 THE COURT: Right.

23 MR. MCGOWAN: In a subsequent corporate witness
24 deposition of Mr. LaPointe, the questioning was drawn
25 specifically to conversation, and when that question was

1 withdrawn specifically to conversations, there was not a
2 work product objection. There was an objection based on,
3 quote unquote, "common interest privilege," which doesn't
4 exist in our view as a standalone privilege.

5 There are two depositions. There are two
6 different framings of the question.

7 THE COURT: Yes. Let's go to the first, the
8 first one, because -- hold on a second. Give me a second.
9 All right.

10 And this conversation points to why I've got
11 concerns about the way the issue was teed up. So I'm
12 looking right now at document 204-1, which is the transcript
13 of the deposition that Ms. Durie conducted, and at page 2
14 87, there's a question.

15 And these -- incidentally, these questions and
16 these responses were cited by you in your briefing. And so
17 the first question is found at line 16 of 287.

18 Question: So can you tell me, do you know,
19 Mr. Stark, what information Celsee provided Bio-Rad about
20 the 10X litigation in the virtual data room?

21 And Mr. Younkin said, that's a yes or no. You
22 can answer that question.

23 And so the witness answered. Actually, the
24 witness asked for some kind of repetition. And then if you
25 turn to page 288, the question is repeated. The witness

1 said, I believe I do, yes.

2 Then the question is: What information did
3 Celsee provide?

4 Mr. Younkin at that point objected: I'm going
5 to instruct the witness not to answer the question on the
6 grounds that it calls for work product protection material.
7 All right.

8 Then Ms. Durie asked: Did Celsee provide
9 information Bio-Rad about the 10X litigation outside of the
10 virtual data room, and then again, there's an objection.

11 Now, this time Mr. Younkin says: I'm going to
12 instruct the witness not to answer that question as phrased
13 on the ground that it calls for privileged and work product
14 information.

15 So then if you go to the next page, page 289,
16 the question that again where we have an objection is, the
17 question is: Did Celsee provide any information Bio-Rad
18 about the 10X litigation outside the virtual data room
19 between the time the letter of intent, the non-binding
20 letter of intent was signed and the time the parties entered
21 into the ultimate transaction?

22 The witness was permitted to answer that
23 question initially, and then though there was an objection,
24 and the objection was for both privilege and for work
25 product.

1 So in there, this witness I do see, the way I
2 look at it is, there are two things now at issue with this
3 witness. One is questions that are being addressed about
4 the contents of the virtual data room, there's a work
5 product objection. Questions that are addressed by the
6 negotiations between the two parties, it looks at the very
7 least it's privileged and perhaps it's also work product.

8 Then later on there's a question I think you're
9 talking about, which says, did the parties -- this is on
10 page 291 -- did the parties discuss in connection with
11 negotiating this non-binding letter of intent whether the
12 escrow holdback would include some for the 10X litigation?

13 And then on that one, there's a work product
14 objection, not a privilege question, a work product
15 question, and that's found at lines 19 to 22.

16 Then the next -- well, that's it, I think.
17 Right? So that's the first deposition.

18 So as I understand the objections for that
19 deposition, there are really two issues. One is, what's put
20 in the virtual data room and that's a work product

21 objection. And then the second one is conversations between
22 the two parties, and there's a, it looks like I will give
23 you the benefit of the doubt, an attorney/client privilege
24 objection and a work product objection.

25 All right. Now, in your papers before the

1 Magistrate you say, we don't want any work product. I mean,
2 you say you don't want any attorney impressions. That, to
3 me, I'm treating synonymous with you don't want work
4 product.

5 So what is it, you know, that you really want, I
6 mean, when I look at that?

7 MR. MCGOWAN: So the note in the submission to
8 the Magistrate indicated that we're not trying to delve into
9 their files, which was a reference to the kind of material
10 that is discussed in the Hewlett-Packard case, which is
11 something that's created to the litigation, may have been
12 transferred, but which exists on a standalone basis as a
13 work product doctrine. That would correspond possibly,
14 because we don't know the contents, to something that would
15 have been put in the data room, but it exists independently
16 of the conversations and the negotiation. It sits there and
17 maybe somebody looks at it. Maybe they don't.

18 It's not something that is said back and forth
19 verbally or exchanged back and forth in an e-mail as a
20 counter-proposal or something like that.

21 But I do believe that distinction tracks. The
22 30(b)(6) witness on this topic, Mr. LaPointe, which is in
23 Exhibit B, and the instruction there is somewhat different
24 as the scope was more highly drawn.

25 And I apologize, Your Honor. When you were just

1 reading the second excerpt that you were reading, I missed
2 the page number you were on. The portion that I was
3 referring to was on page 298, 3 to 14, which is what
4 defendant cited in its submission to this Court. My
5 apologies.

6 THE COURT: Right. 298.

7 MR. MCGOWAN: Eight to 14. My apologies.

8 THE COURT: And that is a specific question.
9 It's another one. I didn't read that one, but that's
10 another one. What were the considerations that led you to
11 the [REDACTED] number, and there's an objection. Don't
12 answer because it calls for the disclosure of privileged and
13 work product information.

14 MR. MCGOWAN: That's the, that's the reference,
15 it's my recollection, that defendant cited in its submission
16 to this Court saying that the defendant did instruct on work
17 product grounds.

18 We then have the 30(b)(6) deposition --

19 THE COURT: But this is my point. You say you
20 cite that to me. What did you cite to the Magistrate?

21 MR. MCGOWAN: To the Magistrate, we did not
22 understand that they were taking the position that the
23 negotiations themselves are work product because the
24 instruction to the corporate witness was the common interest
25 instruction with respect to discussions.

1 What we tried to do with the Magistrate is
2 narrow this down somewhat. We're trying to narrow it down
3 somewhat here so that we present a cleaner issue in an
4 effort to actually tee it up than is sometimes presented in
5 the cases where you have underlying work product doctrine
6 material.

7 So what we presented to the Magistrate was an
8 effort to get at the back and forth, so I don't know if
9 that's responsive to your question. What we're focusing on
10 both here and before the Magistrate is the communications
11 themselves. So if the Court's question is, where is the
12 argument to the Magistrate, it would be in the transcript
13 before the Magistrate at page 27.

14 And --

15 THE COURT: Well, wait. Well, let's go to your
16 letter, because you've got to tee this up in your letter.
17 So where is it in the letter?

18 MR. MCGOWAN: I mean --

19 THE COURT: And the reason I'm getting at all of
20 this because, see, I think this is a really important issue.

21 Right? It deals with privilege. I don't think it was teed
22 up really cleanly, and I'm not faulting anybody because
23 there were a lot of discovery issues and it's in the middle
24 of a deposition. And I mean, frankly, the fact that it was
25 the third issue is my recollection in the letter, it was

1 almost like it didn't seem this was the most pressing issue
2 and yet I don't want to rush into a very important decision
3 about privilege and work product when it really hasn't been
4 teed up.

5 And then, and I think you are cleaning up things
6 now, and, again, I'm not necessarily faulting for that, to
7 try to make it like it's, you know, a narrow issue. But,
8 see, then that's why I want you to get back to the practical
9 issue, which I asked you to open up with. Where are things,
10 because, you know, it's almost like we should just present
11 this anew, and therefore it's important for me to think
12 about proportionality issues, burden, probative value of the
13 information being sought, and so that's why I want to know,
14 where do things stand? Did you, after the Magistrate ruled,
15 was there another deposition of any witness?

16 MS. DURIE: Your Honor, this is Daralyn Durie.
17 May I address that issue?

18 THE COURT: Sure.

19 MS. DURIE: Your Your Honor, so we did take a
20 second deposition of Mr. Stark. It was extremely

21 abbreviated and there were literally a handful of questions
22 that Celsee permitted, but we were not able to get any
23 further information from Mr. Stark on this topic. The only
24 information that he provided was the identity of the lawyers
25 whose analysis had been referenced in the investor letter

1 and that was that.

2 THE COURT: Okay.

3 MS. DURIE: So from our perspective, this does
4 remain very much a live and important issue.

5 THE COURT: All right. And where does the case
6 stand? See, this all became an issue right at the very end
7 of fact discovery, or you tell me. When did it come up in
8 terms of the case schedule and where do things stand with
9 the case schedule?

10 MS. DURIE: It did come up towards the end of
11 fact discovery and we are now in the process of submitting
12 expert reports.

13 THE COURT: All right. So fact discovery is
14 over?

15 MS. DURIE: It is.

16 THE COURT: All right. You're in the middle of
17 expert discovery. Do we have a trial date?

18 MS. DURIE: We do, Your Honor. The trial
19 date -- go ahead.

20 MR. McGOWAN: I didn't mean to interrupt. We do
21 have a trial date, Your Honor, yes. It's June 14th.

22 THE COURT: June 14th of next year. Okay. When
23 are summary judgment motions due?

24 MR. McGOWAN: February 5th, Your Honor.

25 THE COURT: All right. What do you hope to get

1 from Mr. Stark? Give me some examples of the information
2 that you think you could get if there were no objections and
3 explain to me its probative value.

4 MR. MCGOWAN: Okay. Your Honor, this is Dave
5 McGowan again. I can respond to that.

6 If I may just note for the record, the answer to
7 the question that you asked, where was it raised in the
8 submission to the Magistrate, is at page 3 of the letter
9 where both the Stark and LaPointe transcripts are cited in
10 limited portion that we referenced.

11 THE COURT: Okay. Hold up, hold up. It's page
12 3 of the letter?

13 MR. MCGOWAN: Page 3.

14 THE COURT: Right. And you say, you just
15 broadly say -- basically, you went through what I cited,
16 which is the 287 to 291, 295 to 296, and then the one we
17 just covered, 298 to 299. Correct? And then you also
18 point to the LaPointe transcript at 55, 56 and page 59.
19 Correct?

20 MR. MCGOWAN: Yes. The LaPointe transcript is
21 the distinction I was drawing earlier. The LaPointe
22 transcript is drawn to conversations and the assertion at
23 those pages is common interest.

24 THE COURT: And I read that. I agree that that
25 was teed up. Okay.

1 MR. McGOWAN: In answer to the Court's question
2 with respect to relevance and probative value, the
3 communications between the two parties regarding the
4 litigation are relevant to the issues certainly of
5 infringement, damages, in the sense that what the buyer in
6 these cases is asking is, what's going on in this case? How
7 do I think about it?

8 Now, this is just a stock acquisition. This is
9 not one of the cases where the buyer is getting a division,
10 they're going to keep selling the product and wind up being
11 a joint, joint defendant, which is what all the other cases
12 are like, and it is a not a successor liability case as far
13 as the defendants are arguing.

14 But what they are asking is, tell us how right
15 we should be about this, how right do you think we should
16 be, and the buyer and the seller are going to have different
17 takes on that presumably, but they are going to talk about
18 the underlying merits from a business point of view in the
19 sense that they are going to translate the business

20 practices of the defendant in the dollar terms based on

21 whether the defendant is practicing the patent, the kind of
22 information that is relevant to the Georgia-Pacific factors,
23 how important is this business, what kind of a holdback do
24 we need to cover ourselves, what implications does this
25 have.

1 When you go through the Georgia-Pacific factors,
2 a lot of them are about the competitive position of the
3 business team, the value of the invention. In essence, how
4 significant is this.

5 THE COURT: Can I stop you for a second?

6 MR. MCGOWAN: Yes.

7 THE COURT: So, all right. So you are telling
8 me that these negotiations occur when?

9 MR. MCGOWAN: These negotiations are in 2019.

10 THE COURT: All right. And what is the time
11 frame that I'm supposed to consider in applying the
12 Georgia-Pacific factors to ascertain damages or what a
13 jury would be instructed to consider? What is the time
14 frame?

15 MR. MCGOWAN: So you're going to look at it on
16 the eve of first infringement typically subject to the Book
17 of Wisdom, which means that sometimes you can do a lookback.

18 To the extent that the negotiations are
19 addressing --

20 THE COURT: I'm not a patent lawyer.

21 MR. MCGOWAN: Sorry.

22 THE COURT: I'm thinking Bible when you say Book
23 of Wisdom, so I don't know what that means and I don't know
24 what the clause you said afterwards. But, you know, I don't
25 have your expertise, so I have to go back to, so the

1 negotiations that we're talking about are occurring in 2019.

2 Do you have a month?

3 MR. MCGOWAN: August is my recollection.

4 THE COURT: Okay. And then infringement for
5 damages in the patent, this patent case, I'm supposed to
6 look to Exhibit 8 of first infringement. When is that
7 alleged by you to have occurred, or actually by Celsee to
8 have occurred?

9 MR. MCGOWAN: I need to look at it by month.

10 THE COURT: That's all right.

11 MS. DURE: Your Honor --

12 MR. MCGOWAN: I misspoke, Your Honor.
13 Negotiation of the letter of intent is December of '19.

14 THE COURT: December of 2019. Okay. But that's
15 the letter of intent. So beginning December of '19 and
16 extending into what would cover the negotiations?

17 MR. MCGOWAN: So the date range is the case is
18 filed in May. The negotiation of the initial NDA is
19 September of '19. The letter of intent on which the

20 Magistrate relied is December of '19. The business
21 transaction is done, the acquisition is in April of '20.

22 THE COURT: Okay. Great. All right. So it's
23 going to be some time between December of 2019 and April of
24 2020 when the conversations about which you would like to
25 learn occurred. Is that correct?

1 MR. MCGOWAN: And if I can go back to the
2 Court's --

3 THE COURT: Sorry. We didn't hear an answer. I
4 think it might have been a technical thing.

5 Am I correct, the time frame of the negotiations
6 about which you'd like to discover evidence, those
7 negotiations occurred between December 2019 and April 2020?

8 MR. MCGOWAN: That is correct, Your Honor.

9 THE COURT: Okay. Sorry. All right. Now, so
10 then let's go back to date of first infringement. What are
11 we looking at? What's the time frame for that?

12 MR. NOVIKOV: Your Honor, this is Gene Novikov
13 for 10X.

14 I can answer that quickly as folks try to
15 marshal back. December 8, 2018.

16 THE COURT: December 8, 2018. Okay. All right.

17 So then, and forgive me, sir. It's Mr. --
18 what's your name again, sir?

19 MR. MCGOWAN: McGowan.

20 THE COURT: McGowan. Sorry.

21 So, Mr. McGowan, why is it probative what folks
22 are thinking about in 2019, when I'm supposed to be looking
23 at what occurred or at least I'm supposed to be using the
24 time frame as of December 8, 2018?

25 MR. MCGOWAN: Sure. Thank you, Your Honor. And

1 I apologize for the Book of Wisdom reference. I tried
2 to clarify that. I try to avoid jargon. The Court is
3 quite right, this is a general issue, not a patent specific
4 issue.

5 To the extent that the business discussions bear
6 on the question of what are the prospective damages from the
7 case, part of that is going to have a liability element.
8 Part of that is going to have a damages element.

9 The damages element, there should be no
10 difference between what is said in the business discussions
11 and the date of hypothetical negotiation, because the date
12 of hypothetical negotiation is part of the damages input,
13 and to the extent the business discussion and the merger is
14 talking about what do we think that number will be, it's
15 going to be talking about the process of estimating the
16 value of litigation.

17 So from that point of view, there is no
18 difference between what one would expect the business
19 discussions to be focusing on and the analysis the Court
20 would do in a damages context.

21 The reference that I made to the Book of Wisdom
22 refers to the Supreme Court case and some District Court
23 cases that indicate that in some circumstances, if there's
24 relevant information during a period of time after the
25 hypothetical negotiation, that can be taken into account as

1 well. It is not prohibited. It is true that under the
2 Georgia-Pacific factors, typically look at the date of first
3 infringement. There's not a flat prohibition on considering
4 subsequent evidence, and sometimes that happens. And, for
5 example, people are looking at changing the business
6 practices, which one would expect to be part of an
7 acquisition negotiation as well.

8 So --

9 THE COURT: Okay. Sorry. Let me just push you
10 back though. Let's assume there were no negotiations.
11 Right? I'm going to go back, or the jury is going to be
12 asked to go back to December 8, 2018, and consider the
13 Georgia-Pacific factors. Right?

14 Now, do the Georgia-Pacific factors include
15 anything about the trial judge's proclivities or a
16 philosophical approach to patent cases and damages?

17 MR. McGOWAN: Ideally, they certainly don't say
18 that, and one would expect that that is not something a
19 juror would be instructed on.

20 THE COURT: Okay. Do they consider the quality
21 of the lawyers that are engaged in the patent lawsuit that's
22 before them?

23 MR. McGOWAN: The Georgia-Pacific factors don't.
24 I don't know if the Court is asking me two questions. The
25 jurors -- I think that would be up to them.

1 THE COURT: Well, okay. That's fair because
2 it's a pretty bad question.

3 My point is that we don't ask jurors, and, in
4 fact, I think the law would preclude us from asking jurors
5 in deciding whether damages should be awarded and how much
6 damages should be awarded to consider all of the things that
7 lawyers consider when they evaluate a case, right, which
8 would include things like the quality of the judge or the
9 philosophy or proclivities of the judge, whether the
10 jurisdiction is a plaintiff or defendant-friendly
11 jurisdiction, how good the lawyers are, how much time has
12 been spent in developing the case, all of these kind of
13 legal strategic things. Right?

14 You would agree that that is what really goes
15 into or at least it plays a prominent role in any assessment
16 of the value of a case. Right?

17 MR. MCGOWAN: I think with respect, Your Honor,
18 I would provide qualified agreement. I think that might
19 reflect the litigation side, but I would not presume, and
20 certainly I don't think there has been a proffer to this
21 effect, that that is what the business discussions are
22 about, because the business discussions from the buyer's
23 side are, we're going to buy the stock of this company. We
24 see there's litigation out there and we need to pick a
25 number to protect ourselves.

1 It would surprise me, quite candidly, if the
2 only thing the businesspeople talked about were things that
3 business lawyers don't do day to day, which is proclivities
4 of judges, this and that.

5 I certainly would not assume that the
6 discussions that are the subject of the present motion would
7 exclusively bear on specific factors unrelated to the
8 business of the defendant, the infringement of the defendant
9 and the economic consequences of that infringement. It
10 would surprise me if there were only litigation tactics
11 discussed in a merger where you've got corporate people
12 talking to each other. If that's the testimony, then that
13 would be the testimony, but we don't know that and I don't
14 think we can assume it.

15 THE COURT: All right. Now, this is a stock
16 acquisition. Right? You mentioned that?

17 MR. McGOWAN: That's what the letter of intent
18 states.

19 THE COURT: What was the ultimate transaction?
20 In what form did it take? How was it structured?

21 MR. McGOWAN: I don't have the answer to that
22 question at my fingertips. I believe it was consistent
23 throughout, but I need to look that up.

24 So --

25 THE COURT: So you don't know if it was a stock

1 acquisition or a merger, or we just don't know. All we know
2 is that at the time of the negotiation, Bio-Rad wanted to
3 buy stock. Right?

4 MR. MCGOWAN: At the time of the letter of
5 intent on which the Magistrate relied, the letter of intent
6 recites a stock date.

7 THE COURT: Right.

8 MR. MCGOWAN: And I have nothing to contradict
9 that.

10 THE COURT: And I might have overstated it.
11 Right? It's not that -- I mean, it's probably more precise
12 to say Bio-Rad was interested in purchasing stock.

13 MR. MCGOWAN: Correct. It is a nonbinding
14 letter on the system, and in our view, that distinguishes it
15 from most of, on whole of the common interest case law,
16 which there found to be a common interest.

17 THE COURT: Right. So I go back to understand
18 how exactly this was presented to the Magistrate or how it
19 ought to be presented today. You know, in footnote 3 you

20 write, 10X is not seeking attorney files or mental
21 impression, but rather information concerning the

22 negotiation of the agreement between counterparties, but
23 then the questions you cite, at least a lot of them, go to
24 the content of the virtual data room.

25 So maybe, I mean, is it fair to say that really,

1 you're not pursuing, you don't need to know what's in the
2 data room? All you want to know is what was said across the
3 table?

4 MR. MCGOWAN: What we're pursuing in this
5 submission is the across-the-table communications. That
6 would be for the e-mails.

7 THE COURT: And you had an agreement, I think,
8 right, that there would be no logging of documents that
9 postdate the beginning of the litigation. Is that right?

10 MR. MCGOWAN: That is correct.

11 THE COURT: And you want what? A 30(b)(6)
12 witness to come in and just answer questions about what was
13 said to Bio-Rad during the negotiation. That's, at the end
14 of the day, what you want. Is that fair?

15 MR. MCGOWAN: Fair. Yes, Your Honor.

16 THE COURT: All right. Anything else you want
17 to bring to my attention?

18 MR. MCGOWAN: The only point that I'd like to
19 make is that I believe that this can be done simply on the

20 law just by looking at Rule 26, because in our view, the

21 across-the-table communications and work product in the
22 first instance.

23 THE COURT: Wait, we had a technical glitch.
24 Can you repeat that because I don't know what you said
25 between privilege and work product, so can you just start?

1 MR. McGOWAN: Sure.

2 THE COURT: What did you say? We can resolve by
3 looking at Rule 26 because what?

4 MR. McGOWAN: Because we don't believe the
5 across-the-table communications are work product in the
6 first instance, and we believe the Magistrate treated them
7 as being work product.

8 THE COURT: Well, I mean, look, and this may
9 be -- I mean, they could be work product to the extent if
10 somebody from 10X said, my lawyer told me X, Y and Z because
11 she thought blank because she thought A, B and C, I mean,
12 that's work product. Right? It's communicating work
13 product. You would argue it's waiving it, but the point is,
14 it is conveying the mental impression.

15 MR. McGOWAN: Right.

16 THE COURT: And you said you're not interested
17 in getting those. So that's why you, you know, say you're
18 not seeking attorney mental impressions, so it seems to me
19 based on that footnote, you shouldn't get to get work
20 product even if it were weighed during the negotiation.

21 MR. McGOWAN: And I apologize if it's unclear.
22 I think that if a statement is made across the table,
23 that's, A, not work product; and, B, if there were work
24 product, it would be waiver, and we can talk about the
25 Philippines case and selective waiver and all the rest.

1 What we're trying to indicate in that footnote
2 is, we're not trying to dive down into the underlying
3 documents and the litigation files. We're trying to
4 distinguish what we're asking for in the Hewlett-Packard
5 case, Sealed Air case, where they are trying to go down into
6 the litigation files. We're trying to stay across the
7 table.

8 If across the table a lawyer or a businessperson
9 in a corporate setting recites something, then that
10 recitation is not work product, and it's strictly a waiver
11 analysis, we think the error that we want to draw to the
12 Court's attention is in treating those statements themselves
13 as work product.

14 I believe the law on waiver would establish that
15 the communication constitutes a waiver because we don't have
16 the facts that were put within the common interest stock,
17 but the distinction we're trying to draw is between
18 litigation files and across the table, and I apologize if I
19 was not clear on that point.

20 THE COURT: Well, that's all right. But, see,

21 you know, the thing is, work product, it's a different test
22 whether work product has been waived. And would you agree
23 that at least there are circumstances where an NDA -- let me
24 start again.

25 There are circumstances where parties share

1 attorney impressions pursuant to an NDA and there would be
2 no waiver because under Westinghouse, they did take
3 appropriate measures to try to guard the secrecy of that and
4 limit the distribution of that work product?

5 MR. McGOWAN: I think that the answer to Your
6 Honor's question is a qualified yes. The qualification
7 comes from the requirement in the common interest cases that
8 there be a common legal interest as this Court said, in the
9 Dow chemical case, such as co-defendants or anticipation of
10 joint litigation.

11 Just for the record, I think that the rule on
12 this is stated in the Philippines case, the Republic of the
13 Philippines case at page 1429, where the Court says, a party
14 who discloses documents protected by the work product
15 doctrine may continue to assert the document's protection
16 only when the disclosure furthers the doctrine's underlying
17 goal.

18 I agree that work product and privilege have
19 some different aspects. The purpose of work product is to
20 prepare for trial. Rule 26 says, in anticipation of
21 litigation or for use at trial.

22 It is not anything that happens because
23 litigation is out there. It's not the case that if I have
24 to rent extra office space in order to accommodate the files
25 of the case, that the lease agreement becomes work product

1 and is subjectively the reason I did it is because of the
2 litigation. It's a purpose driven doctrine, and the point
3 is whether the communication in question furthers the
4 purpose of the doctrine.

5 In the Hewlett-Packard case and the other common
6 interest cases in Maine, disclosures are found within a
7 common interest when there is a common interest such as
8 being joint defendants, and the disclosure relates to that
9 interest.

10 THE COURT: Right. Now, on this though, let me
11 just stop you, because you didn't argue any of this to the
12 Magistrate. Right?

13 MR. McGOWAN: I think that before the
14 Magistrate, I think that what we did is argue that -- we
15 argued the instruction we got. We did not understand at the
16 time that they were going to claim that, the defendant was
17 going to claim that the negotiations were themselves work
18 product, so what we argued was the common interest point.

19 THE COURT: Right. But, see, in fairness to
20 them, I know you apologized for it. You don't need to
21 apologize, but you have.

22 I mean, I go back to how you presented it in
23 footnote 3. You said you're not seeking attorney files or
24 mental impression, and that's why I began the conversation
25 by just talking about dissatisfaction on my part in the way

1 the thing was teed up. I'm not faulting anybody, but just
2 that's the reality. And a lot of the questions in the first
3 deposition were really designed to find out what was in the
4 data room, and I could see in the data room there being what
5 would normally be called work product, like opinions of
6 counsel about validity or invalidity of patents, things like
7 that.

8 MR. MCGOWAN: Sure.

9 THE COURT: But I'm just going to tell you right
10 now, I mean, I think you've waived your right to pursue that
11 because of the footnote, the content of the footnote says
12 it, and it sounds like you're not pursuing the data room
13 documents anyway. So I think that I'm just going to go
14 ahead and say that's the way I am going to rule, that you
15 have -- by footnote 3, you waived your right, or at least
16 you didn't tee up, and it's too late to do so now, to find
17 out or obtain documents that would reflect the mental
18 impressions of attorneys.

19 And, furthermore, it sounds like this morning

20 you're saying you are not even pursuing documents from the
21 data room at this point. You want to limit the scope of

22 your discovery requests to oral and e-mail communications
23 between the parties between December 2019 and April of 2020.
24 Is that right?

25 MR. MCGOWAN: Yes. And just to go back to the

1 point you just made, it was at the end of footnote 3 where
2 we say we're not seeking mental impressions, but information
3 concerning the negotiation of the agreement. What we're
4 doing, in fairness, I think is consistent with the
5 negotiations point even in that footnote.

6 THE COURT: Well, but I raised it because I
7 think it explains why -- you know, you say you didn't raise
8 these, this issue of Westinghouse or what's the purpose of
9 the disclosure. You're faulting 10X. I'm sorry. You're
10 faulting Celsee, and I'm not finding that very persuasive.
11 It sounds like you have raised cases in the first instance
12 before me that weren't addressed to the Magistrate.

13 MR. McGOWAN: May I have one brief response to
14 that, Your Honor?

15 THE COURT: Sure. Go ahead.

16 MR. McGOWAN: As I said before, when we were
17 going through exhibits, Exhibit G, by focusing on
18 communication, we were focusing on the line of inquiry where
19 the objection was straightforwardly common interest. I
20 don't think that there was any effort made at any point in
21 time to establish that a negotiating statement is a work
22 product statement, but the briefing before the Magistrate
23 focused on the question whether there was a common interest,
24 and we discussed the Hewlett-Packard cases on most of those.
25 But I don't believe there was ever any effort to establish

1 that the communications were themselves work product. The
2 objection of the 30(b)(6) deposition, a common interest
3 privilege.

4 THE COURT: Well see, I disagree. That's why I
5 read it to you at the outset. I mean 291:

6 Question: Did the parties discuss in connection
7 with negotiating this nonbinding letter of intent whether
8 that escrow holdback would include some for the 10X
9 litigation?

10 Mr. Younkin: Instruct the witness not to
11 answer that question on the grounds it calls for work
12 product. That sounds like a work product objection.

13 MR. MCGOWAN: Right, but I was referencing the
14 30(b) deposition.

15 THE COURT: Well, okay. All right. But you
16 cited before the Magistrate, and I thought that was -- the
17 discovery issue is related to both depositions.

18 MR. MCGOWAN: It is. The more specific to the
19 communications in the negotiation I think is the 30(b)
20 instruction. That's the point that I'm making.

21 THE COURT: Okay. All right. We have narrowed
22 it now, I think. We have narrowed it to all you want are
23 oral and e-mail communications between December '19,
24 April 2020, between Celsee and Bio-Rad relating to the
25 escrow and fees, expenses and damages relating to this

1 case.

2 MR. MCGOWAN: I would say the litigation. I
3 don't know if there are things that are --

4 THE COURT: Okay.

5 MR. MCGOWAN: -- related to the escrow that are
6 in there, because we don't know what was said yet.

7 THE COURT: Right.

8 MR. MCGOWAN: A fair summary.

9 THE COURT: Okay. That's where we are. All
10 right. And you want to also get from that any statements
11 that may have conveyed attorney mental impressions?

12 MR. MCGOWAN: Yes. Anything that was said back
13 and forth, our view is not work product in the first
14 instance, and if it happened to convey work product does not
15 fall within the common interest exception for waiver.

16 We have not discussed the details of the
17 exception a lot, but it catches out to just what the Court
18 said. If there is a mental impression and an
19 across-the-table statement, our request is that that would
20 have to be disclosed as well. What doesn't need to be

21 disclosed are the things sitting in the files themselves
22 or things just sitting in people's heads that were not
23 stated.

24 THE COURT: Okay. And then on the merits -- I
25 don't know if it's the right word, but on the common

1 interest issue, I mean, your position is it's a non-binding
2 letter, the negotiating across the table from each other.
3 It's a stock acquisition, so it's not like Bio-Rad has taken
4 on the defense of this litigation and so the cases that are
5 cited by 10X are inapposite. Is that a fair summary?

6 MR. MCGOWAN: Fair summary, Your Honor. Yes.

7 THE COURT: Okay. All right. Let me hear from
8 the other side then.

9 MR. YOUNKIN: Thank you, Your Honor. This is
10 Jeremy Younkin.

11 I think if I may just at the outset point out
12 that there were really two independent grounds for the
13 Magistrate Judge's decision, and so one of them was the
14 squarely work product.

15 And so as we have discussed today, 10X stated in
16 their footnote that they were not interested in attorney
17 mental impressions, and then the Judge asked, well, why do
18 you want this information?

19 And they said, because we think, as we've heard
20 today, that the negotiation is going to reflect the parties'
21 views about the value of this case. And, indeed, I think
22 Mr. McGowan has made it clear, it's their theory this
23 evidence is relevant because, you know, it's going to
24 reflect, you know, quote, "how worried we should be and what
25 are the underlying merits of the action and what are the

1 potential damages."

2 And when Magistrate Judge Fallon heard that, she
3 said, I can't think of a clearer example of work product,
4 and then she said, that work product protection was not
5 waived because it is difficult to waive work product. You
6 need to do something that allows your adversary to find out
7 the information, and that was not done here.

8 Celsee and Bio-Rad were talking to one another
9 under a nondisclosure agreement about an acquisition and
10 there was really no risk that 10X was going to get the
11 information and so work product protection applies and it
12 wasn't waived, full stop. I mean, and that standing alone
13 without even getting into common interest case law provides
14 grounds to affirm Magistrate Judge Fallon's decision and
15 finds --

16 THE COURT: But I mean I feel bad for Magistrate
17 Judge Fallon because I just think the way it was teed up was
18 kind of unfair to her.

19 So let's go to the transcript that you've just
20 recited. What page are you on?

21 MR. MCGOWAN: Well, her statements, if you look
22 at the very end on page 38 of the transcript.

23 THE COURT: Right.

24 MR. YOUNKIN: She says, in addition, even
25 putting aside the common interest doctrine, so she is taking

1 that out of the equation, the work product doctrine affords
2 an additional basis for protection of the information that
3 plaintiffs plaintiff seeks to compel.

4 THE COURT: Right. Now, you know, it's not
5 clear to me. What is she talking about? The information
6 the plaintiff seeks to compel? What's the information the
7 plaintiff seeks to compel that she's referring to?

8 MR. YOUNKIN: I think what she's referring to
9 are the communications between Bio-Rad and Celsee about this
10 litigation. And so the way that this kind of came up, Your
11 Honor, if you turn to page 28 of the transcript --

12 THE COURT: Right.

13 MR. YOUNKIN: Okay?

14 THE COURT: I'm there.

15 MR. YOUNKIN: Okay. So this is Mr. Novikov
16 arguing about why he says the negotiations of the escrow
17 provision are not subject to common interest, and I will
18 just point out that Mr. Novikov opened with this argument
19 and so clearly 10X understood --

20 THE COURT: Sorry, sorry. What line were you on
21 and then start again.

22 MR. YOUNKIN: Page 28. 28, Line 7.

23 THE COURT: Okay. All right. Got you. Thanks.

24 MR. YOUNKIN: Okay. So this is 10X arguing, and
25 they say that their assessments, meaning the Bio-Rad and

1 Celsee's assessments or representations as part of that back
2 and forth about how much this litigation is worth, and then
3 what financially they view the risk to be is certainly
4 highly relevant to a number of issues. And so Judge
5 Fallon's reaction to that is found on page 36.

6 THE COURT: Okay.

7 MR. YOUNKIN: And if we look at line 16 --
8 sorry, the beginning of that paragraph around line 10, she's
9 talking about these communications. I think there, clearly
10 we're talking about the communications between Celsee and
11 Bio-Rad about the escrow provision.

12 And then at line 16, she says, these go to the
13 very heart of what the parties think about what this case
14 ending in litigation is worth, and I can't think of a clear
15 example of what might be protected by the work product
16 privilege.

17 And, indeed, we've heard today that their whole
18 theory of this evidence is that it will reflect each party's
19 mental impressions about this litigation -- the strengths,
20 the weaknesses, the damages. And that sort of evidence
21 is -- it's just product information.

22 THE COURT: Hold on. I agree with you. All
23 right. So on that statement, I do understand that, and I do
24 think there's no question about it. Then I think we've got
25 an issue about whether there's a waiver of disclosing it.

1 MR. YOUNKIN: Okay.

2 THE COURT: And so the way I look at it is that
3 because of footnote 3, that wasn't teed up. In other words,
4 the way I look at it is the footnote 3 -- sorry. Hold on
5 one second.

6 There it is. In footnote 3, the statement that
7 10X does not seek an attorney files for mental impression.
8 So as far as I'm concerned, they don't get to get -- they
9 are not asking the Magistrate to force them, to force a
10 disclosure of mental impressions. That wasn't teed up and
11 so I'm going to affirm the Magistrate to the extent that she
12 said that on page 36 that Celsee's evaluation, or, rather,
13 Celsee's attorney's evaluation of the case is quintessential
14 work product, I think that's true. And why I am going to
15 affirm her, I'm not sure this is the reason she made the
16 ruling, but I'm going to affirm it is, you can't in a, what
17 is effect effectively a motion to compel, which is the
18 letter dated September 21, 2020, at DI 204, you can't say
19 you're not seeking attorney files or mental impressions and
20 then expect to get them.

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21 So I don't have to get into whether or not there
22 was a waiver of work product during the course of these
23 negotiations or not because that issue in my mind wasn't
24 properly brought up to the Magistrate, and, in fact, it was
25 essentially -- it was waived, and so I'd affirm her on that

1 issue.

2 So now what I think is left though -- well,
3 what's left in the negotiation and the back and forth, okay,
4 where there's not a disclosure by Celsee about the
5 impressions of their attorney as far as valuing the case,
6 but there are negotiations, other statements they made that
7 do not reveal work product.

8 Now, why shouldn't 10X get that information?

9 MR. YOUNKIN: Well, I don't think actually that
10 they are seeking that information. I mean, I think --

11 THE COURT: Well, I mean, I think Mr. McGowan is
12 seeking that information.

13 Mr. McGowan -- wait. Let me just ask him
14 because I thought it was pretty clear, that's what he wants.
15 He just wants as well any disclosures that included work
16 product.

17 Mr. McGowan, that's what you are seeking.
18 Right?

19 MR. McGOWAN: The Court is correct. If it's
20 across the table, it's the subject of our submission to the
21 Court.

22 THE COURT: Right. But, okay.

23 MR. YOUNKIN: Okay. But I think we're
24 potentially talking past each other here. I mean,
25 Mr. McGowan's position is anything said across the table he

1 wants, and I think Your Honor just said, well, if it's work
2 product material, you don't get it.

3 THE COURT: Correct.

4 MR. YOUNKIN: And so my -- right.

5 THE COURT: But there's still a lot of other
6 information. I mean, in other words, a person across the
7 table could say, he could say, I think the case is worth
8 this much, or she could say, I don't know who the 30(b)(6)
9 witness is going to be. She could say, you know, we think
10 the case is worth this much, or she could say -- I mean, she
11 could make revelations about a lot of stuff without
12 disclosing work product.

13 MR. YOUNKIN: Your Honor, I disagree with that.
14 I think if somebody says I think the case is worth X, that
15 is a disclosure of -- I mean, that's protected by the work
16 product, because that is one party telling the other party
17 its mental impression about the value of the litigation,
18 which is, of course, informed by, as I said, that's clearly
19 a mental impression about the value of the case.

20 ¹⁰²⁰
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And so --

21 THE COURT: Hold on. Attorney work product goes
22 to the attorney's mental impression. Now, the client might
23 agree with the attorney or disagree with the attorney, but
24 the client's ultimate mental impression is not the
25 attorney's mental impression.

1 The other thing is, and I'm sure you're
2 familiar, I mean Upjohn, all the work product cases
3 distinguish between fact and opinion. And so what I want
4 you to focus on now, so this is the issue. I'm basically,
5 I'm not going to allow Celsee to get a disclosure of the
6 mental impressions of 10X's attorneys. Okay? They've
7 waived that by their footnote. So to that extent, I'm
8 affirming the Magistrate.

9 What remains to be decided is, what about the
10 rest of the negotiation? And I am concerned that the
11 Magistrate Judge read too much into AgroFresh. I'm
12 concerned that AgroFresh and the other cases upon which you
13 rely don't really apply here, and yet I'm also concerned, as
14 I mentioned in my questioning of Mr. McGowan, about how
15 probative is this stuff and is it even worth the burden
16 of a deposition.

17 And, you know, I see where you drop a footnote
18 in your papers in front of me based on relevance, but did
19 you do that in front of the Magistrate? Did you argue
20 proportionality or burden or relevance in front of the
21 Magistrate?

22 MR. YOUNKIN: I believe that I noted it during
23 the hearing, Your Honor, but really, the way that the issue
24 was teed up was, it was an argument to that privilege
25 instructions given at a deposition were improper, and so

1 that was their argument, and so we were defending the
2 privilege instruction.

3 I did note at the hearing that the relevance
4 argument seemed a bit stretched, but certainly, we weren't
5 instructing the witness not to answer a question at a
6 deposition based on relevance grounds.

7 I do think --

8 THE COURT: I've got the transcript in front of
9 me, where did you say that or something about burden,
10 relevance, or any considerations, proportionality?

11 MR. YOUNKIN: Yes. And this may have been --
12 this may have actually been in connection with the first
13 argument.

14 Yes. I mean, so to be clear, the statement is
15 that I was referring to is on page 19 and it really is
16 dealing with the first of the two arguments that were before
17 her.

18 THE COURT: Okay. So the bottom line is, you
19 really didn't argue proportionality or overly burdensome or
20 even relevance as a basis to prevent further deposition of
21 this 30(b)(6) witness. Correct?

22 MR. YOUNKIN: Not with respect to this argument.
23 That's right.

24 THE COURT: Okay. So then I think we're stuck.
25 Right? So then I do have to, it looks like, address the

1 common interest doctrine and whether it applies. Is that
2 fair?

3 MR. YOUNKIN: I actually don't think that that
4 is correct, Your Honor, because I think that the waiver, the
5 waiver rules around a work product are much more stringent
6 than the waiver rules --

7 THE COURT: I'm not going to give them work
8 product. I've already said that. You've won that.

9 MR. YOUNKIN: They don't -- okay. I think there
10 is still an open question about the limits of that though,
11 because, firstly, I do need to say that the work product
12 doctrine does not just protect attorney mental impression.
13 It also protects the mental impressions of a party about
14 litigation, so that's number one.

15 Number two --

16 THE COURT: All right. So, wait. Now, this is
17 an example of, unfortunately, you guys are asking me to make
18 a pretty, you know -- there are few things more important
19 than attorney/client privilege and attorney work product.

20 Do you have a case that says that if I ask a

21 client about the client's mental impressions, that that is
22 prohibited by the attorney work product doctrine?

23 MR. YOUNKIN: Well, Your Honor, yes. I think
24 that just the plain language of Federal Rule of Civil
25 Procedure 26(b) (3) --

1 THE COURT: All right. Hold up. Let me pull it
2 up. 26 what?

3 MR. YOUNKIN: (b) (3) .

4 THE COURT: Okay.

5 MR. YOUNKIN: Okay. So, and this is Section A.

6 THE COURT: All right.

7 MR. YOUNKIN: Which is basically the work
8 product rule. And it says, ordinarily, a party, 10X, may
9 not discover documents and tangible things that are prepared
10 in anticipation of litigation or for trial by or for another
11 party, another party, or its representatives, including the
12 party's attorney.

13 And so a party, you know, a company gets a
14 demand letter or something and the CEO works on it and forms
15 a mental impression about the value of the case. That can
16 clearly be work product. And so when you have --

17 THE COURT: Well, I didn't say it couldn't be,
18 but --

19 MR. YOUNKIN: I was just trying to make the
20 point that work product protection is not limited to an

21 attorney's mental impressions, that it also covers a party's
22 mental impressions about a litigation. And here, that's all
23 they want. All they want is a party's mental impressions
24 about this case, and I think Judge Fallon heard that and she
25 said, that's clearly work product. You don't get that.

1 And, you know, I think in this case, too, I
2 mean, attempting to tease out, you know, even if you were to
3 say, well, okay. Let's try to distinguish the lawyers's
4 mental impressions from the negotiators mental impressions,
5 I mean, I'm not even sure how you could possibly do that,
6 which is why I say, they're only interested in the mental
7 impressions. If the discussions do not reveal or reflect
8 what a party thinks about this case, they don't want them.
9 That's their whole theory of relevance here, which is why I
10 think the Magistrate Judge said, that's what sounds like
11 what you want is work product. You, 10X, have to show
12 waiver of work product and you can't do that because the
13 parties were talking under a nondisclosure agreement and
14 there is no risk that that information would get to 10X.
15 And you can do that just based on the waiver rules around
16 work product without even delving into, you know,
17 Hewlett-Packard and the common interest body of case law.
18 It's just independent grounds of affirmance.

19 And I do not think --

1022

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20 THE COURT: So let me just ask you this. Let's

21 say Bio-Rad at the last minute said, we're not doing this
22 deal and, or let's say Celsee said we're not doing it and
23 then Bio-Rad sued Celsee. Are you telling me that those
24 negotiations, they would never see the light of day in a
25 Court if there was a dispute over the meaning or, you know,

1 the way the negotiations went?

2 MR. YOUNKIN: I don't know the answer to that
3 question, Your Honor. I mean, I think it's possible in that
4 situation that --

5 THE COURT: Well, it happens all the time. It
6 happens all the time when there's a negotiation that doesn't
7 get consummated or gets consummated and the parties argue
8 about it. As long as parol evidence is admitted, if you
9 have then an ambiguous contract or something, this is the
10 kind of evidence that comes in under the parol evidence
11 rule.

12 MR. YOUNKIN: Well, the parties -- the parties,
13 of course, are free to waive work product if they decide to
14 in a litigation, and here, that's not being done. The
15 parties are, you know, making their work product objection.

16 I also want to make just one point about it
17 seems like Mr. McGowan is drawing this distinction between
18 the documents in the data room, which he, I think, now
19 concedes is off-the-table and communications that were made
20 in a negotiation, but there's no reason to draw a

21 distinction between those two things. It's just, it's just
22 the form of communication.

23 And so if we all agree that if an opinion of
24 counsel gets put into the data room and there's no waiver,
25 then the same thing should apply if the contents of the

1 opinion of counsel are disclosed in an oral communication or
2 an e-mail.

3 THE COURT: I don't think he said that and I
4 don't need to rule on that because I've already said he
5 doesn't get work product. He doesn't get work product
6 because they took the position in footnote 3 that they
7 weren't seeking it. All right.

8 So the only question is, do they get the
9 communications that went back and forth between the parties.
10 I mean, to me, I mean, I don't think it has huge probative
11 value, but as you said, you didn't make that argument.

12 Now, the good question is, you know, they're
13 making a new argument, you could argue, so can I just
14 consider now, like what's the relevance of this material?
15 What would be the burden to produce it? But you have not
16 said anything in that regard even though I've asked.

17 MR. YOUNKIN: Well, I mean, I think that I mean
18 I would point to the footnote that we make in the response
19 to the objection, and I would also say that the
20 circumstances have changed a bit because, you know, where we
21 find ourselves right now is November 5th, the plaintiffs
22 served an opening damages report, so we already have their
23 expert opinion on what she thinks the damages in this case
24 should be, and we're about to serve our rebuttal report on
25 Friday, tomorrow.

1 And then what they want to do is have a
2 deposition in the next couple of weeks, I guess, that they
3 think is going to uncover evidence that's going to bear on
4 damages, and so then what are we going to do? Supplemental
5 reports, you know, as we head towards summary judgment in
6 February?

7 I mean, just from a practical standpoint, you
8 know, it's going to be difficult. Like I said --

9 THE COURT: Have you considered what kind of
10 burden it would take to go review all the different e-mails
11 and communications between 10X and Bio-Rad? You didn't log
12 the material. Right? Have you even conducted a search for
13 the material?

14 MR. YOUNKIN: I don't, I don't know the answer
15 to that question. You know, these requests, the requests
16 for the Bio-Rad discussions in particular came in pretty
17 late in discovery. We objected to them. There was a little
18 bit of hashing things out. But I mean I think that we have
19 been pretty clear that we weren't going to produce these
20 ¹⁰²⁸communications, you know, going way back.
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21 And, really, I mean, the issue really got teed
22 up around this, the deposition as opposed to responses to
23 document requests. But like I said, Your Honor, I think
24 that we still have to address this issue of we all agree
25 that they're not entitled to work product information, but I

1 think it still leaves open a question, well, what is work
2 product information? And Judge Fallon said, communications
3 about this litigation are covered by the work product
4 doctrine, and that conclusion, we submit, is not clearly
5 erroneous, and 10X has not shown that it was.

6 They are not asking for communications about,
7 you know, some random provision in this merger agreement.
8 They are asking for communications about the litigation.
9 That's all they care about.

10 THE COURT: Well, there was no work product
11 objection lodged to the 30(b)(6) witness. Right? It was
12 based solely on the objection on the common interest
13 exception.

14 MR. YOUNKIN: But the common interest exception,
15 I mean, I don't think that's mutually exclusive of work
16 product. Really, what the common interest exception is
17 saying, the underlying privilege was not waived. And, by
18 the way, the LaPointe deposition happened first, and so they
19 understood kind of what our position was, I think, and if
20 they had any questions about it, they could approach further
21 with Mr. Stark, the witness who is actually involved in the
22 negotiation, and they didn't.

23 And so they asked him specific questions. You
24 know, what were the considerations that led to this escrow
25 provision? And I was there and I objected to work product

1 grounds. And as I think you said, it really couldn't have
2 been clearer.

3 And then in the meet-and-confer, which
4 Mr. McGowan didn't attend, work product was featured. I
5 mean, I was telling Mr. Novikov that I thought that work
6 product prevented him from getting this information. And so
7 they understood this was an issue, which is why they dropped
8 a footnote to address it briefly in their letter.

9 And then when we got to the argument,
10 Mr. Novikov opened up by arguing that communications about
11 this negotiation, about the negotiation of this merger
12 agreement are not covered by the work product doctrine.

13 So that was aired, and the Magistrate Judge
14 disagreed and said, no, that those communications are
15 covered by the work product doctrine.

16 THE COURT: So why don't you explain to me why
17 communications with another party that's trying to buy, is
18 interested in purchasing your stock, why would my
19 communications with that entity constitute work product?

20 MR. YOUNKIN: Because the content of the
21 communication is a mental impression about the litigation,
22 and so just as a side note here, the deal is being
23 characterized as a stock deal. I mean, this is an
24 acquisition. Right? Bio-Rad bought it. They own it now.
25 It's not just they bought ten percent of the shares or

1 anything like that. Bio-Rad purchased, acquired,
2 100 percent of Celsee.

3 THE COURT: Okay.

4 MR. YOUNKIN: But so if there's a negotiation
5 happening and under an NDA where a defendant in a lawsuit is
6 talking about somebody who wants to buy them and the
7 defendant says to the potential acquirer, let me tell you my
8 mental impressions about this litigation, okay. So what is
9 being communicated is a mental impression that had been
10 formed in connection with the litigation.

11 And the disclosure of that mental impression to
12 the other side is not a waiver in the same way that, you
13 know, if you had -- you know, a general counsel sits down
14 and says something like, you know, here are the defenses to
15 this, to this claim, here are the arguments that I think,
16 you know, are good ones that we're making, those are his or
17 her mental impressions. And if you disclose that to a
18 potential acquirer under an NDA, under the very strict rules
19 surrounding waiver, which they had the burden to prove,
20 there is no waiver, and that's what Judge Fallon held and
21 she was correct.

22 THE COURT: Well, I'm having a hard time. You
23 know, you cite 26(b)(3)(A). I mean, that deals with
24 documents and tangible things. So, A, that is off the
25 table. We're not talking about that. We're talking about

1 conversations, number one, and then we're talking about
2 e-mails that are sent to Bio-Rad. They are not in
3 anticipation of litigation. I mean, you've got to
4 demonstrate to me why they would be.

5 I get where it may be within those documents
6 they are conveying what 10X's lawyers thought about the case
7 and they are not getting that. We've already discussed
8 that. So I want us to go back and narrow the scope of what
9 is really being addressed.

10 Now, I do think it's, you know, it's informative
11 that they are buying all the stock, so they are taking over,
12 they're basically taking over the case, and they are, is it
13 fair to say then they are at least indirectly inheriting the
14 liability in the litigation in your view?

15 MR. YOUNKIN: I mean, subject to the terms of
16 the merger, which address this.

17 THE COURT: Okay. What does it address? What
18 does it say?

19 MR. YOUNKIN: Well, there are -- I mean, there

20 are --

21 THE COURT: Actually, what does the letter of
22 intent say? Let's focus on that, about what happened to the
23 litigation.

24 MR. YOUNKIN: The letter of intent says that
25 Bio-Rad will acquire a hundred percent of Celsee, and then

1 it goes through some of the money payments. I do not
2 believe that it talks about -- you know, then it says we're
3 going to do due diligence and it doesn't mention the
4 litigation, I don't think, just looking at it quickly,
5 expressly.

6 The merger agreements does contain provisions
7 that squarely address the litigation, including how it's
8 going to be paid for, and those are, those are the
9 provisions that 10X wants discovery on.

10 But, again, if you have -- let's just say you
11 have two businesspeople sitting across the table from each
12 other and one businessperson says, as Mr. McGowan asked, how
13 worried should we be? How could that question possibly be
14 answered without revealing the attorney's mental impression?

15 THE COURT: Very easily. You just don't
16 disclose what your attorney said to you or wrote to you.

17 MR. YOUNKIN: But the negotiators, the
18 negotiators's view on that is inextricably tied to what his
19 lawyers are telling him. A businessperson is not an
20 independent view of the potential liability separate and

21 apart from information that has been given to him by
22 lawyers. No way is he forming a judgment about that.

23 THE COURT: Well, I don't find that argument
24 very compelling.

25 So, Mr. McGowan, here's where I am. It just

1 strikes me that I don't see how I would let into evidence in
2 front of a jury any statements that were made during the
3 course of the negotiations, because I think if I applied
4 Rule 403, I would conclude that the probative value here
5 would be substantially outweighed by a number of
6 considerations. I think it would confuse the jury and
7 potentially mislead the jury because I don't think any of
8 the statements that might have been made during the
9 negotiation with respect to the value of the litigation or
10 potential damages award, I don't think that it would be --
11 it would be fair or proper to have the jury try to parse,
12 well, how much of that is based on things that the jury
13 should never think about, some of the legal strategies and
14 assessments about juries, about judges. I just think it
15 would -- and I think the probative value is limited.

16 Now, I have not heard anything about burden
17 from 10X, but I really just question why we need to have
18 teed up --

19 MR. McGOWAN: May I respond, Your Honor?

20 THE COURT: Yes. Sorry. I was hoping you

21 would. Thanks.

22 MR. McGOWAN: I just wasn't sure if the Court
23 was concluded.

24 Let me suggest that a 403 ruling usually has the
25 benefit of the proffered testimony, so there's something

1 concrete to rule on. Part of the discussion we've just been
2 having is hypothesizing what the testimony might be, and if
3 Bio-Rad comes in and makes its own statement, that's what
4 we've looked at. Says, yes, we've got a problem there. It
5 feels very different from the kind of hypotheses that 10X's
6 counsel was just making.

7 I think the way to cut through all of this is to
8 actually adduce the testimony respecting the Court's work
9 product, the way the Court has ruled, but the Court I think
10 is correct, that that is not everything. And I agree that
11 back and forth across the table in a merger in a hundred
12 percent stock acquisition, I don't think that makes a
13 difference in the common interest doctrine. But I think
14 that kind of evidence comes in all the time. I don't think
15 there's a plausible work product decision there.

16 So I think the way to cut through this is to
17 respect the Court's ruling that it has made on work product,
18 recognized that there was some residuum, then find out what
19 it is and then have a concrete piece of testimony or a
20 concrete question that can be addressed. That's what I
21 would suggest.

22 I feel as though making assumptions about what
23 might be the case is not a good way to resolve the question
24 of admissibility or a question of burden when that hasn't
25 really even been briefed.

1 And --

2 THE COURT: Well, I said, I used the conditional
3 language when I said it, and I said it with the hope that
4 you might think the odds of it coming in are so minimal,
5 that you wouldn't pursue it. But you are not willing to do
6 that, and I'm not making a definitive 403 judgment because I
7 don't have something specific in front of me. I was just
8 sharing with you my general thought process based on your
9 explanation of how this information you hoped to get would
10 be probative. It is just I didn't find it really, really
11 compelling.

12 MR. McGOWAN: Sure. If I can just -- let me
13 just -- I don't want to dwell too much in hypotheticals, but
14 the Court alluded earlier to the idea that, well, maybe
15 Bio-Rad makes a comment that is not -- and a Celsee person
16 agree with it.

17 THE COURT: Wait. You broke off again. You
18 said Bio-Rad makes a comment and then I lost you.

19 MR. McGOWAN: And then a Celsee person agrees
20 with it and says, yes, that's true. That could be a

21 liability issue, not a damages issue. That's a response to
22 a comment. That's not work product in any respect.

23 Now, what the Court would do with that, would
24 think about that in a 403 context would depend, I think, on
25 the question, and the Court would have something concrete to

1 look at. But I really feel as though with respect to the
2 Magistrate's ruling, that the premise that the non-mental
3 impressions across the table testimony is not work product,
4 I think that's a matter of law. I don't think there was any
5 foundation laid to show that it's work product and I don't
6 think there has been any laid here.

7 So I think that ruling was incorrect with
8 respect to the traunch of communications the Court has
9 identified this morning.

10 Then the question becomes, if I take the Court's
11 point to be is the game worth the candle with respect to
12 that bit of information. We're looking at a June trial
13 date. I don't think this -- I have not heard a reason why
14 this should take a huge amount of time, but I think that in
15 order to follow the legal rules of work product and
16 admissibility, we really need to see what the evidence is so
17 concrete decisions can be made.

18 MR. YOUNKIN: If I can respond to that?

19 THE COURT: Yes. Sure. Go ahead.

20 MR. YOUNKIN: I mean, you know, Courts make

21 relevance calls all the time before we know what the answer
22 is. That's what -- I mean, when you are ruling on a motion
23 to compel a document request, the question is, you know,
24 what is the question? What are the documents you are
25 seeking and are those relevant? Can you show that they're

1 relevant?

2 And, you know, and prejudice and burden can play
3 a role in that as well. I mean, here, we're here on a
4 motion to compel answers to questions that were asked at a
5 deposition. This shouldn't be, you know, open up, have a
6 whole deposition. They should come in here and say, point
7 to the transcript. Here's the question I asked. It was
8 blocked. I would like an answer to that question.

9 And I don't think that Mr. McGowan can point to
10 any questions that were asked where, you know, he feels like
11 he needs the answer in order to make an argument that, you
12 know, that passes 403 muster.

13 MR. MCGOWAN: May I respond, Your Honor?

14 THE COURT: Sure.

15 MR. MCGOWAN: The instruction given in
16 Exhibit G, the corporate deposition, was a categorical
17 instruction.

18 MR. YOUNKIN: That issue has been waived. I
19 mean, what they asked Magistrate Judge Fallon for was a
20 deposition of Mr. Stark. They did not ask for a new

21 30(b)(6). They didn't ask for Mr. LaPointe to reappear.
22 They said, this is in --

23 THE COURT: All right. So, hold on. This is
24 the first, you know, that somebody has said that to me.
25 Maybe it's in the papers, but this is -- again, I go back

1 to, it just wasn't really presented, at least something that
2 I would grasp immediately. So hold on.

3 So the pending motion is solely to redepose
4 Mr. Stark. Is that right?

5 MR. YOUNKIN: Yes. Footnote 1 in their letter
6 brief to the Magistrate Judge.

7 THE COURT: All right. Hold up. Well, this is
8 made in the context of another argument.

9 MR. YOUNKIN: Well, the proposed order is to
10 produce Mr. Stark to provide deposition testimony as a
11 corporate representative. I mean, Mr. Stark wasn't our
12 corporate representative on any topic. He is a former
13 employee.

14 THE COURT: Okay. So, you know, now I'm looking
15 at it, it does say, Celsee should be compelled to reproduce
16 Mr. Stark to testify as its corporate representative
17 concerning the negotiation of the merger agreement. I mean,
18 that's a 30(b)(6) witness. They want Mr. Stark to be the
19 witness because they think he's probably most knowledgeable,
20 but I mean, they're asking for a 30(b)(6) witness. They
21 just want it to be Mr. Stark. That's on page 3 of your
22 letter, DI 204. I don't think they've waived their right to
23 have a 30(b)(6) witness given that language.

24 Okay. Anything else anybody wants to bring to
25 my attention?

1 MR. YOUNKIN: I mean, we've been going for
2 awhile, Your Honor, so I don't want to belabor the point. I
3 will just say though that I think you have really focused on
4 this one prong of the Magistrate Judge's decision, which I
5 think is fully sufficient to affirm, which is the no waiver
6 of work product, but there is a separate and independent
7 ground around the common interest doctrine, and I think that
8 what, you know, what 10X is trying to do here, you know, and
9 I think that they've been pretty candid about it, is
10 basically get this Court to rule for the first time in
11 Delaware at the Third Circuit that you cannot have a common
12 interest when you're in merger talks. A common interest
13 doctrine simply doesn't apply there.

14 THE COURT: No. So I don't view it that
15 broadly. I mean, frankly, I would prefer not to opine,
16 period, because I don't think -- because of the manner in
17 which the issues were brought to me and brought to the
18 Magistrate. But I don't think they're asking for as broad a
19 ruling as you just said. Am I correct?

20 MR. YOUNKIN: At the hearing they told the
21 Magistrate Judge -- I mean, their position is that
22 Hewlett-Packard was wrongly decided and that it should no
23 longer be followed. And the Magistrate Judge says, well, if
24 I agree with you, is this going to (inaudible) privilege
25 whenever there's a merger?

1 And they candidly said, yes, they would like the
2 District of Delaware to say that Hewlett-Packard was wrongly
3 decided and it's not the law in Delaware. And so that when
4 parties -- and they would like the Court to follow, you
5 know, other cases, like out of Illinois that say that when
6 parties are in a merger negotiation, there's no common
7 interest.

8 It's just not the law in the Third Circuit. I
9 mean, the Sealed Air case rejected that, rejected that
10 argument squarely and then there's a Bankruptcy Court in
11 Delaware that did the same.

12 And so I think that they are candidly saying
13 that they would like, that they would like Your Honor to
14 rule that Hewlett-Packard is not the law of Delaware and
15 that that line of cases --

16 THE COURT: First of all, when you say that the
17 law -- so actually, this gives me a perfect example. In
18 fact, I'm glad. I forgot to raise this and I really should
19 have at the outset, but it's a perfect example of why I mean

20 this is not teed up for me. And let me ask Mr. McGowan
21 first.

22 Mr. McGowan, are you there?

23 MR. MCGOWAN: I'm here.

24 THE COURT: So what law of privilege should
25 guide, should I follow?

1 MR. McGOWAN: To the extent that -- Rule 26 is
2 the answer to the Court's question. To the extent the
3 common interest doctrine has been recognized and we're
4 dealing with a federal question case, then I think on work
5 product, it's always Rule 26.

6 THE COURT: Wait, wait, wait. So hold on.
7 We're not dealing with work product. I already ruled on
8 work product.

9 MR. McGOWAN: Right.

10 THE COURT: So we are only dealing with
11 privilege. All right? So what rule applies?

12 MR. McGOWAN: Okay. I apologize. When the
13 Court said privilege, so the rules that the Court would be
14 bound by I believe would be Third Circuit.

15 The rule --

16 THE COURT: When you say -- wait. When you say
17 rule of the Third Circuit, so when the Third Circuit
18 addresses a privilege, doesn't it look to the state law, the
19 state law privilege that's relevant?

20 MR. YOUNKIN: So it depends on the basis for
21 jurisdiction in my view, Your Honor.

22 So in a diversity case, for example,
23 attorney/client privilege with respect to causes of action
24 grounded in state law would be governed by state law. With
25 respect to work product, state law is not relevant because

1 it's a rule of civil procedure, and under the Erie doctrine,
2 the Federal Rules govern.

3 THE COURT: But we're not dealing with work
4 product. Right? I only have a brain, I've got a limited
5 brain. I'm not as smart as you guys. The reason why I'm
6 bringing up work product, I lose track of things. I'm only
7 interested in this issue and no one briefed this.

8 So let help out again with --

9 MR. YOUNKIN: Sure.

10 THE COURT: -- when I'm making a privilege call
11 in a patent case in the Third Circuit, does it matter
12 whether the lawyers are from one jurisdiction or another?
13 Does it matter -- you tell me. How do I figure out, because
14 the states have different views about what's privileged or
15 not. Correct?

16 MR. YOUNKIN: I agree with that, Your Honor, and
17 I don't want to repeat the Rule 26 phrase if I can call it
18 that because I don't want to sidetrack this discussion.

19 The common interest doctrine is not an
20 independent privilege. It is an anti-waiver rule. So if
21 the question is how does the common interest doctrine relate
22 to some underlying privilege against disclosure, then the
23 answer to what law the Court looks to depends on the basis
24 of jurisdiction. In a patent case, we don't need to worry
25 about that. It's a federal question.

1 The common interest doctrine is largely federal
2 common law, which I understand is not supposed to exist, the
3 Erie case, but it has been absorbed out of the criminal
4 cases starting with joint defense and it has now become a
5 case law doctrine.

6 So the answer to the Court's question, the
7 exception is a federal case law exception, the underlying
8 privileges or protections against disclosure are Rule 26 in
9 this case, because I don't believe there has been an
10 attorney/client privilege argument in this case and we can
11 set that aside.

12 You were correct, if it were attorney/client
13 privilege, then you would have to look to see if it's
14 diversity or federal question, then federal question would
15 be under the rules and would probably absorb common law of
16 the state in which the communication was made, but that's
17 not important to the Court's decision here, I don't think.

18 THE COURT: What --

19 MR. McGOWAN: So if I can --

20 THE COURT: Go ahead.

21 MR. McGOWAN: So if I can respond on the common
22 interest question, I don't think that we're asking for a
23 ruling of the breadth that counsel just described and I also
24 don't think the Hewlett-Packard case is the font of all
25 knowledge.

1 This Court, the District of Delaware,
2 established the rule applied in Hewlett-Packard in the
3 Union Carbide case with reference to protective shield
4 in cases such as co-defendants or anticipated joint
5 litigation.

6 Hewlett-Packard has a broad policy discussion of
7 how important it is for business deals to get done, but its
8 very specific holding tracked the Union Carbide case. And
9 in the Hewlett-Packard case, the issue was sale of a
10 division where the seller had been practicing the patent for
11 the sale and the buyer was going to practice after the sale,
12 so in all likelihood they would have wound up on the same
13 caption as defendants with respect to different periods of
14 time.

15 The Sealed Air case, when it goes back to
16 Hewlett-Packard and reads it, also applied the joint
17 litigation test that goes back to this Court's 1985 ruling
18 in Union Carbide.

19 And our point is then the Sealed Air case is a
20 successor liability case. It's a little unusual because the
21 parties were worried that the transaction itself was going
22 to be a fraudulent transfer of assets, but the Court made
23 very clear that the liability of the seller and the buyer
24 was the same liability.

25 So using the Union Carbide rule and its whole

1 stars of co-defendants for joint litigation, that's what the
2 case is recognizing a common interest against Lozier turned
3 on.

4 The reason I mentioned the stock acquisition is
5 acquiring even a hundred percent of the stock of a company
6 doesn't really matter, doesn't put the buyer on the same
7 caption. It gives it an economic interest in the company
8 whose assets it holds, but I've not heard Celsee suggest
9 that Celsee has been merged into Bio-Rad so that it's now
10 Bio-Rad. I haven't heard it suggested that it's no longer a
11 standalone company. What has been suggested I believe is
12 that its stock is now owned by somebody else. That's not
13 Hewlett-Packard, Sealed Air, and it's not the Union Carbide
14 test.

15 So I don't think that there needs to be any
16 broad ruling or very general statement about the common
17 interest doctrine. If we just follow the actual facts and
18 holdings of the cases and bring it back to its origin, I
19 think that that doctrine doesn't apply in this circumstance.

20 THE COURT: Okay.

21 MR. YOUNKIN: If I may, Your Honor, I need to
22 point out --

23 THE COURT: No. Go ahead. I think that the
24 challenge for you is that Union Carbide addressed a
25 situation where there was, where both parties were likely to

1 be involved in what the Court called "anticipated joint
2 litigation," and we don't have that here, do we?

3 MR. YOUNKIN: Well, what we have here is a
4 company that is the -- that now owns, 100 percent owns a
5 party to litigation. And I don't think that there's
6 anything in the case law that suggests that this question
7 turns on whether or not post acquisition the acquiring
8 company is going to be added as a named defendant in the
9 case. I think that that is a much too narrow reading of
10 these cases and it's not what they argued.

11 I mean, what they argued to the Judge, to
12 Magistrate Judge Fallon, was Courts have widely rejected the
13 contention that a company and a potential purchaser who sat
14 on opposite sides of the bargaining table share a commonly
15 owned interest in contemplated or pending legal proceedings.
16 That was the argument they presented to her, and she said,
17 that's not correct. That's not correct under Sealed Air.
18 It's contrary to AgroFresh and it's contrary to the
19 Hewlett-Packard line of cases.

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21 The cases that they cite are completely
22 different from our case. They cite a case where somebody
23 was going to buy a majority share of a company, just a
24 majority share, but that's just an investment.

25 When you buy 51 percent of a company, you might
have an economic interest, but that is completely different

1 from owning the company. You know, owning 100 percent of
2 it. It's a subsidiary at that point. Right?

3 And --

4 THE COURT: Yes, but I mean --

5 MR. YOUNKIN: The way the deal was structured --

6 THE COURT: Have you read Judge Chen's opinion
7 in Nidec? I mean, he really braces the history of the
8 common interest privilege, and one thing he points out is
9 that the parties have to have a joint legal interest and we
10 don't have that here. Right? There there's no joint legal
11 interest, is there? It's economic.

12 MR. YOUNKIN: Well, I think it's the same
13 interest you see in Sealed Air or you see in
14 Hewlett-Packard.

15 Nidec, all that was happening in Nidec was --

16 THE COURT: You know, you keep saying
17 Hewlett-Packard, and you say, oh, it's binding in Delaware.
18 I mean, Judge Chen didn't go with Hewlett-Packard. Right?

19 MR. YOUNKIN: I'm not suggesting --

20 THE COURT: A Delaware case, which is Union
21 Carbide, but even it's not binding. You know, why --

22 MR. YOUNKIN: I agree with you, Your Honor.

23 THE COURT: Yes. Why should I give more to
24 Hewlett-Packard than I give to Nidec?

25 MR. YOUNKIN: Well, I think for two reasons.

1 One, I think that Nidec is distinguishable
2 because there, you have a situation where an investment
3 group is trying to buy the majority stake of a company.
4 They are not going to own it. That's number one.

5 Number two, Hewlett-Packard has been -- has been
6 followed in the Sealed Air case out of New Jersey, and also,
7 you know, we think that it is the correct, it's the correct
8 decision.

9 But, you know, as I think we've been talking
10 about, I mean, what they tried to do in a very short letter
11 brief to the Magistrate Judge was get a ruling, and the
12 transcript is crystal clear on this. The Magistrate says,
13 the Magistrate asked them, if I find in your favor, won't
14 that mean that there's no common interest when there's
15 merger discussions? And the answer was, yes, I think that's
16 right.

17 And the Magistrate Judge said, I don't think
18 that is the law. And it's their burden now to come in and
19 say that she, that she, like, misapplies binding precedent.

20 And then they point to Nidec, which is a
21 factually distinguishable case out of the Northern District
22 of California.

23 THE COURT: All right. Anything else?

24 MR. MCGOWAN: I could comment further if the
25 Court wishes it.

1 THE COURT: No. You know, I had hoped this
2 argument would make it unnecessary for me to have to address
3 the legal issue, but I guess it doesn't look like I'm going
4 to be able to do that, and, frankly, it's going to take me a
5 little bit of time.

6 What I would like is, I'm going to give you
7 chance by next Wednesday to file a letter no more than
8 750 words to address what is the applicable law of privilege
9 to make the decision. You know, Mr. McGowan, you can answer
10 orally that question, but I think I wouldn't mind seeing
11 both parties respond to that.

12 Whether I might look to state law, federal law,
13 federal common law and also just to lay out how I make that
14 decision, what's a starting point for that decision, and
15 then what is the applicable privilege law and common
16 interest law. All right?

17 MR. YOUNKIN: You want both parties to submit on
18 the same day, Your Honor?

19 THE COURT: Yes. Why don't you do Wednesday at
20 noon, so you both have to do it at the same time. You know,
21 I think the unfortunate thing about this is, you know, you
22 guys have to keep going with the calendar here and I'm just
23 bothered because I still continue to think at the end of the
24 day, I doubt this has really much probative value and, you
25 know, I've got to spend -- we just have limited resources

1 and the cases are, I don't want to take the case off the
2 track its on as far as proceeding to trial in June, but
3 we'll just have to do what we do.

4 All right. Anything else from the plaintiff?

5 MR. McGOWAN: No. Thank you, Your Honor.

6 THE COURT: All right. Anything from the
7 defendant?

8 MR. YOUNKIN: No, Your Honor. Thank you.

9 THE COURT: Thanks, everybody. Bye-bye.

10 (Telephone conference concluded at 11:14 a.m.)

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EXHIBIT B

FILED UNDER SEAL

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE DISTRICT OF DELAWARE

- - -

10X GENOMICS, INC., : CIVIL ACTION
Plaintiff, :
vs. :
CELSEE, INC., :
Defendant. : NO. 19-00862-CFC-SRF

- - -

Wilmington, Delaware
Thursday, November 5, 2020
9:30 o'clock, a.m.
***Telephone conference

- - -

BEFORE: HONORABLE COLM F. CONNOLLY, U.S.D.C.J.

- - -

APPEARANCES:

RICHARDS, LAYTON & FINGER
BY: JASON J. RAWNSLEY, ESQ. and
FREDERICK L. COTTRELL III, ESQ.

-and-

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16 **- - -**

1 P R O C E E D I N G S

2
3 (The following telephone conference began at
4 9:30 a.m.)

5
6 THE COURT: All right. Can I have a roll call?
7 Let's hear from plaintiffs, please.

8 MR. RAWNSLEY: Good morning, Your Honor. This
9 is Jason Rawnsley of Richards Layton & Finger, and I'm also
10 joined by Fred Cottrell from Richards Layton for the
11 plaintiff.

12 Today we're joined by Dave McGowan, Daralyn
13 Durie and Gene Novikov of Durie Tangri, and with the
14 Court's permission, Mr. McGowan will be presenting the
15 argument.

16 THE COURT: Okay. Thank you very much. How
17 about from defendant?

18 MR. FARNAN: Good morning, Your Honor. Brian
19 Farnan on behalf of the defendant, and with me is Barbara
20 Fiacco and Jeremy Younkin from Foley Hoag, and Mr. Younkin
21 will be addressing the Court.

22 THE COURT: All right. Very good.

23 Before we begin, let me just give you some --
24 why I decided to have a call on this.

25 First of all, I think it's a very interesting

1 issue, and by issue, I mean the common interest issue. But
2 I'm very concerned this is really not teed up. I mean, I
3 think that that issue is complicated. I don't think there's
4 any binding precedent, and it just doesn't seem to be teed
5 up in a way that would permit me to make a really informed
6 decision about the scope of the common interest exception
7 under these facts. That is one issue.

8 The second issue is the way it was teed up, I
9 find it very confusing, because on one hand, the defendants
10 have expressly stated in their letter to the Magistrate that
11 they didn't want any attorney impressions. Basically, in
12 the footnote, as far as I'm concerned, they're basically
13 saying we don't want work product and yet they seem to be
14 pursuing work product.

15 And there's a footnote from 10X in its papers
16 where it does raise a relevance objection, but I don't know
17 that there was any kind of briefing or consideration in
18 front of the Magistrate about proportionality and relevance
19 and burden, so I want to hear about that.

20 So I think both parties can be guided in their
21 arguments by what I've just shared. And then I would ask at
22 the outset from plaintiff to just tell me the status of
23 things. Was the deponent -- was there, in fact, a second
24 deposition? Where do things stand in terms of discovery in
25 the case generally? And so let's hear first then from the

1 plaintiff.

2 MR. MCGOWAN: Thank you, Your Honor. This is
3 David McGowan from Durie Tangri. I will try and take the
4 Court's guidance in I think reverse order.

5 Your first question was, is -- are the
6 plaintiffs seeking mental impressions as opposed to some
7 non-work product material. The distinction that's being
8 drawn that the Court references is between the merger
9 negotiation and between the work product and the types of
10 things that in these cases are considered work product,
11 which would be, for example, an opinion letter from the
12 underlying litigation was at issue in the Hewlett-Packard
13 case, but the distinction is between what were the attorneys
14 in the litigation thinking about and pondering inside their
15 heads and what the parties to the merger negotiations said
16 to each other across the table.

17 The across-the-table discussions we do not think
18 are work product under Rule 26 or any precedent and they're
19 also not deliberations that are inside the head. They're
20 statements in a negotiation.

21 If I might proceed stepwise and see if that
22 clarifies the scope for the Court.

23 THE COURT: Well, so I appreciate -- I mean,
24 frankly, the way you just kind of did it, I mean, that's the
25 way I do it, I think of it. I'm not sure your papers did

1 that in front of the Magistrate especially because of the
2 footnote you dropped.

3 And the way I looked at it is you had two
4 depositions. I read the papers last week, so I may get
5 something wrong here. But my recollection is the deposition
6 conducted by Ms. Durie, the questions went to what was put
7 into the data room, into the virtual data room. Is that
8 right?

9 MR. MCGOWAN: The question, the specific
10 question that was teed up is what were the considerations
11 that went to the holdback number with respect to the
12 instruction that they're citing.

13 THE COURT: Okay.

14 MR. MCGOWAN: So there are two different
15 questions, the Court is exactly right. And we are
16 proceeding in view of that distinction, I think, in Exhibit
17 D, Mr. Starks' deposition, the question that led to the
18 instruction the defendant cites in its footnote, in its
19 papers to this Court, that what were the considerations that
20 led to the holdback number and there was an objection on
21 work product and privilege ground.

22 THE COURT: Right.

23 MR. MCGOWAN: In a subsequent corporate witness
24 deposition of Mr. LaPointe, the questioning was drawn
25 specifically to conversation, and when that question was

1 withdrawn specifically to conversations, there was not a
2 work product objection. There was an objection based on,
3 quote unquote, "common interest privilege," which doesn't
4 exist in our view as a standalone privilege.

5 There are two depositions. There are two
6 different framings of the question.

7 THE COURT: Yes. Let's go to the first, the
8 first one, because -- hold on a second. Give me a second.
9 All right.

10 And this conversation points to why I've got
11 concerns about the way the issue was teed up. So I'm
12 looking right now at document 204-1, which is the transcript
13 of the deposition that Ms. Durie conducted, and at page 2
14 87, there's a question.

15 And these -- incidentally, these questions and
16 these responses were cited by you in your briefing. And so
17 the first question is found at line 16 of 287.

18 Question: So can you tell me, do you know,
19 Mr. Stark, what information Celsee provided Bio-Rad about
20 the 10X litigation in the virtual data room?

21 And Mr. Younkin said, that's a yes or no. You
22 can answer that question.

23 And so the witness answered. Actually, the
24 witness asked for some kind of repetition. And then if you
25 turn to page 288, the question is repeated. The witness

1 said, I believe I do, yes.

2 Then the question is: What information did
3 Celsee provide?

4 Mr. Younkin at that point objected: I'm going
5 to instruct the witness not to answer the question on the
6 grounds that it calls for work product protection material.
7 All right.

8 Then Ms. Durie asked: Did Celsee provide
9 information Bio-Rad about the 10X litigation outside of the
10 virtual data room, and then again, there's an objection.

11 Now, this time Mr. Younkin says: I'm going to
12 instruct the witness not to answer that question as phrased
13 on the ground that it calls for privileged and work product
14 information.

15 So then if you go to the next page, page 289,
16 the question that again where we have an objection is, the
17 question is: Did Celsee provide any information Bio-Rad
18 about the 10X litigation outside the virtual data room
19 between the time the letter of intent, the non-binding
20 letter of intent was signed and the time the parties entered
21 into the ultimate transaction?

22 The witness was permitted to answer that
23 question initially, and then though there was an objection,
24 and the objection was for both privilege and for work
25 product.

1 So in there, this witness I do see, the way I
2 look at it is, there are two things now at issue with this
3 witness. One is questions that are being addressed about
4 the contents of the virtual data room, there's a work
5 product objection. Questions that are addressed by the
6 negotiations between the two parties, it looks at the very
7 least it's privileged and perhaps it's also work product.

8 Then later on there's a question I think you're
9 talking about, which says, did the parties -- this is on
10 page 291 -- did the parties discuss in connection with
11 negotiating this non-binding letter of intent whether the
12 escrow holdback would include some for the 10X litigation?

13 And then on that one, there's a work product
14 objection, not a privilege question, a work product
15 question, and that's found at lines 19 to 22.

16 Then the next -- well, that's it, I think.
17 Right? So that's the first deposition.

18 So as I understand the objections for that
19 deposition, there are really two issues. One is, what's put
20 in the virtual data room and that's a work product
21 objection. And then the second one is conversations between
22 the two parties, and there's a, it looks like I will give
23 you the benefit of the doubt, an attorney/client privilege
24 objection and a work product objection.

25 All right. Now, in your papers before the

1 Magistrate you say, we don't want any work product. I mean,
2 you say you don't want any attorney impressions. That, to
3 me, I'm treating synonymous with you don't want work
4 product.

5 So what is it, you know, that you really want, I
6 mean, when I look at that?

7 MR. McGOWAN: So the note in the submission to
8 the Magistrate indicated that we're not trying to delve into
9 their files, which was a reference to the kind of material
10 that is discussed in the Hewlett-Packard case, which is
11 something that's created to the litigation, may have been
12 transferred, but which exists on a standalone basis as a
13 work product doctrine. That would correspond possibly,
14 because we don't know the contents, to something that would
15 have been put in the data room, but it exists independently
16 of the conversations and the negotiation. It sits there and
17 maybe somebody looks at it. Maybe they don't.

18 It's not something that is said back and forth
19 verbally or exchanged back and forth in an e-mail as a
20 counter-proposal or something like that.

21 But I do believe that distinction tracks. The
22 30(b)(6) witness on this topic, Mr. LaPointe, which is in
23 Exhibit B, and the instruction there is somewhat different
24 as the scope was more highly drawn.

25 And I apologize, Your Honor. When you were just

1 reading the second excerpt that you were reading, I missed
2 the page number you were on. The portion that I was
3 referring to was on page 298, 3 to 14, which is what
4 defendant cited in its submission to this Court. My
5 apologies.

6 THE COURT: Right. 298.

7 MR. McGOWAN: Eight to 14. My apologies.

8 THE COURT: And that is a specific question.
9 It's another one. I didn't read that one, but that's
10 another one. What were the considerations that led you to
11 the [REDACTED] number, and there's an objection. Don't
12 answer because it calls for the disclosure of privileged and
13 work product information.

14 MR. McGOWAN: That's the, that's the reference,
15 it's my recollection, that defendant cited in its submission
16 to this Court saying that the defendant did instruct on work
17 product grounds.

18 We then have the 30(b)(6) deposition --

19 THE COURT: But this is my point. You say you
20 cite that to me. What did you cite to the Magistrate?

21 MR. McGOWAN: To the Magistrate, we did not
22 understand that they were taking the position that the
23 negotiations themselves are work product because the
24 instruction to the corporate witness was the common interest
25 instruction with respect to discussions.

1 What we tried to do with the Magistrate is
2 narrow this down somewhat. We're trying to narrow it down
3 somewhat here so that we present a cleaner issue in an
4 effort to actually tee it up than is sometimes presented in
5 the cases where you have underlying work product doctrine
6 material.

7 So what we presented to the Magistrate was an
8 effort to get at the back and forth, so I don't know if
9 that's responsive to your question. What we're focusing on
10 both here and before the Magistrate is the communications
11 themselves. So if the Court's question is, where is the
12 argument to the Magistrate, it would be in the transcript
13 before the Magistrate at page 27.

14 And --

15 THE COURT: Well, wait. Well, let's go to your
16 letter, because you've got to tee this up in your letter.
17 So where is it in the letter?

18 MR. MCGOWAN: I mean --

19 THE COURT: And the reason I'm getting at all of
20 this because, see, I think this is a really important issue.
21 Right? It deals with privilege. I don't think it was teed
22 up really cleanly, and I'm not faulting anybody because
23 there were a lot of discovery issues and it's in the middle
24 of a deposition. And I mean, frankly, the fact that it was
25 the third issue is my recollection in the letter, it was

1 almost like it didn't seem this was the most pressing issue
2 and yet I don't want to rush into a very important decision
3 about privilege and work product when it really hasn't been
4 teed up.

5 And then, and I think you are cleaning up things
6 now, and, again, I'm not necessarily faulting for that, to
7 try to make it like it's, you know, a narrow issue. But,
8 see, then that's why I want you to get back to the practical
9 issue, which I asked you to open up with. Where are things,
10 because, you know, it's almost like we should just present
11 this anew, and therefore it's important for me to think
12 about proportionality issues, burden, probative value of the
13 information being sought, and so that's why I want to know,
14 where do things stand? Did you, after the Magistrate ruled,
15 was there another deposition of any witness?

16 MS. DURIE: Your Honor, this is Daralyn Durie.
17 May I address that issue?

18 THE COURT: Sure.

19 MS. DURIE: Your Your Honor, so we did take a
20 second deposition of Mr. Stark. It was extremely
21 abbreviated and there were literally a handful of questions
22 that Celsee permitted, but we were not able to get any
23 further information from Mr. Stark on this topic. The only
24 information that he provided was the identity of the lawyers
25 whose analysis had been referenced in the investor letter

1 and that was that.

2 THE COURT: Okay.

3 MS. DURIE: So from our perspective, this does
4 remain very much a live and important issue.

5 THE COURT: All right. And where does the case
6 stand? See, this all became an issue right at the very end
7 of fact discovery, or you tell me. When did it come up in
8 terms of the case schedule and where do things stand with
9 the case schedule?

10 MS. DURIE: It did come up towards the end of
11 fact discovery and we are now in the process of submitting
12 expert reports.

13 THE COURT: All right. So fact discovery is
14 over?

15 MS. DURIE: It is.

16 THE COURT: All right. You're in the middle of
17 expert discovery. Do we have a trial date?

18 MS. DURIE: We do, Your Honor. The trial
19 date -- go ahead.

20 MR. MCGOWAN: I didn't mean to interrupt. We do
21 have a trial date, Your Honor, yes. It's June 14th.

22 THE COURT: June 14th of next year. Okay. When
23 are summary judgment motions due?

24 MR. MCGOWAN: February 5th, Your Honor.

25 THE COURT: All right. What do you hope to get

1 from Mr. Stark? Give me some examples of the information
2 that you think you could get if there were no objections and
3 explain to me its probative value.

4 MR. MCGOWAN: Okay. Your Honor, this is Dave
5 McGowan again. I can respond to that.

6 If I may just note for the record, the answer to
7 the question that you asked, where was it raised in the
8 submission to the Magistrate, is at page 3 of the letter
9 where both the Stark and LaPointe transcripts are cited in
10 limited portion that we referenced.

11 THE COURT: Okay. Hold up, hold up. It's page
12 3 of the letter?

13 MR. MCGOWAN: Page 3.

14 THE COURT: Right. And you say, you just
15 broadly say -- basically, you went through what I cited,
16 which is the 287 to 291, 295 to 296, and then the one we
17 just covered, 298 to 299. Correct? And then you also
18 point to the LaPointe transcript at 55, 56 and page 59.
19 Correct?

20 MR. MCGOWAN: Yes. The LaPointe transcript is
21 the distinction I was drawing earlier. The LaPointe
22 transcript is drawn to conversations and the assertion at
23 those pages is common interest.

24 THE COURT: And I read that. I agree that that
25 was teed up. Okay.

1 MR. McGOWAN: In answer to the Court's question
2 with respect to relevance and probative value, the
3 communications between the two parties regarding the
4 litigation are relevant to the issues certainly of
5 infringement, damages, in the sense that what the buyer in
6 these cases is asking is, what's going on in this case? How
7 do I think about it?

8 Now, this is just a stock acquisition. This is
9 not one of the cases where the buyer is getting a division,
10 they're going to keep selling the product and wind up being
11 a joint, joint defendant, which is what all the other cases
12 are like, and it is a not a successor liability case as far
13 as the defendants are arguing.

14 But what they are asking is, tell us how right
15 we should be about this, how right do you think we should
16 be, and the buyer and the seller are going to have different
17 takes on that presumably, but they are going to talk about
18 the underlying merits from a business point of view in the
19 sense that they are going to translate the business
20 practices of the defendant in the dollar terms based on
21 whether the defendant is practicing the patent, the kind of
22 information that is relevant to the Georgia-Pacific factors,
23 how important is this business, what kind of a holdback do
24 we need to cover ourselves, what implications does this
25 have.

1 When you go through the Georgia-Pacific factors,
2 a lot of them are about the competitive position of the
3 business team, the value of the invention. In essence, how
4 significant is this.

5 THE COURT: Can I stop you for a second?

6 MR. MCGOWAN: Yes.

7 THE COURT: So, all right. So you are telling
8 me that these negotiations occur when?

9 MR. MCGOWAN: These negotiations are in 2019.

10 THE COURT: All right. And what is the time
11 frame that I'm supposed to consider in applying the
12 Georgia-Pacific factors to ascertain damages or what a
13 jury would be instructed to consider? What is the time
14 frame?

15 MR. MCGOWAN: So you're going to look at it on
16 the eve of first infringement typically subject to the Book
17 of Wisdom, which means that sometimes you can do a lookback.

18 To the extent that the negotiations are
19 addressing --

20 THE COURT: I'm not a patent lawyer.

21 MR. MCGOWAN: Sorry.

22 THE COURT: I'm thinking Bible when you say Book
23 of Wisdom, so I don't know what that means and I don't know
24 what the clause you said afterwards. But, you know, I don't
25 have your expertise, so I have to go back to, so the

1 negotiations that we're talking about are occurring in 2019.

2 Do you have a month?

3 MR. MCGOWAN: August is my recollection.

4 THE COURT: Okay. And then infringement for
5 damages in the patent, this patent case, I'm supposed to
6 look to Exhibit 8 of first infringement. When is that
7 alleged by you to have occurred, or actually by Celsee to
8 have occurred?

9 MR. MCGOWAN: I need to look at it by month.

10 THE COURT: That's all right.

11 MS. DURE: Your Honor --

12 MR. MCGOWAN: I misspoke, Your Honor.

13 Negotiation of the letter of intent is December of '19.

14 THE COURT: December of 2019. Okay. But that's
15 the letter of intent. So beginning December of '19 and
16 extending into what would cover the negotiations?

17 MR. MCGOWAN: So the date range is the case is
18 filed in May. The negotiation of the initial NDA is
19 September of '19. The letter of intent on which the
20 Magistrate relied is December of '19. The business
21 transaction is done, the acquisition is in April of '20.

22 THE COURT: Okay. Great. All right. So it's
23 going to be some time between December of 2019 and April of
24 2020 when the conversations about which you would like to
25 learn occurred. Is that correct?

1 MR. MCGOWAN: And if I can go back to the
2 Court's --

3 THE COURT: Sorry. We didn't hear an answer. I
4 think it might have been a technical thing.

5 Am I correct, the time frame of the negotiations
6 about which you'd like to discover evidence, those
7 negotiations occurred between December 2019 and April 2020?

8 MR. MCGOWAN: That is correct, Your Honor.

9 THE COURT: Okay. Sorry. All right. Now, so
10 then let's go back to date of first infringement. What are
11 we looking at? What's the time frame for that?

12 MR. NOVIKOV: Your Honor, this is Gene Novikov
13 for 10X.

14 I can answer that quickly as folks try to
15 marshal back. December 8, 2018.

16 THE COURT: December 8, 2018. Okay. All right.

17 So then, and forgive me, sir. It's Mr. --
18 what's your name again, sir?

19 MR. MCGOWAN: McGowan.

20 THE COURT: McGowan. Sorry.

21 So, Mr. McGowan, why is it probative what folks
22 are thinking about in 2019, when I'm supposed to be looking
23 at what occurred or at least I'm supposed to be using the
24 time frame as of December 8, 2018?

25 MR. MCGOWAN: Sure. Thank you, Your Honor. And

1 I apologize for the Book of Wisdom reference. I tried
2 to clarify that. I try to avoid jargon. The Court is
3 quite right, this is a general issue, not a patent specific
4 issue.

5 To the extent that the business discussions bear
6 on the question of what are the prospective damages from the
7 case, part of that is going to have a liability element.
8 Part of that is going to have a damages element.

9 The damages element, there should be no
10 difference between what is said in the business discussions
11 and the date of hypothetical negotiation, because the date
12 of hypothetical negotiation is part of the damages input,
13 and to the extent the business discussion and the merger is
14 talking about what do we think that number will be, it's
15 going to be talking about the process of estimating the
16 value of litigation.

17 So from that point of view, there is no
18 difference between what one would expect the business
19 discussions to be focusing on and the analysis the Court
20 would do in a damages context.

21 The reference that I made to the Book of Wisdom
22 refers to the Supreme Court case and some District Court
23 cases that indicate that in some circumstances, if there's
24 relevant information during a period of time after the
25 hypothetical negotiation, that can be taken into account as

1 well. It is not prohibited. It is true that under the
2 Georgia-Pacific factors, typically look at the date of first
3 infringement. There's not a flat prohibition on considering
4 subsequent evidence, and sometimes that happens. And, for
5 example, people are looking at changing the business
6 practices, which one would expect to be part of an
7 acquisition negotiation as well.

8 So --

9 THE COURT: Okay. Sorry. Let me just push you
10 back though. Let's assume there were no negotiations.
11 Right? I'm going to go back, or the jury is going to be
12 asked to go back to December 8, 2018, and consider the
13 Georgia-Pacific factors. Right?

14 Now, do the Georgia-Pacific factors include
15 anything about the trial judge's proclivities or a
16 philosophical approach to patent cases and damages?

17 MR. MCGOWAN: Ideally, they certainly don't say
18 that, and one would expect that that is not something a
19 juror would be instructed on.

20 THE COURT: Okay. Do they consider the quality
21 of the lawyers that are engaged in the patent lawsuit that's
22 before them?

23 MR. MCGOWAN: The Georgia-Pacific factors don't.
24 I don't know if the Court is asking me two questions. The
25 jurors -- I think that would be up to them.

1 THE COURT: Well, okay. That's fair because
2 it's a pretty bad question.

3 My point is that we don't ask jurors, and, in
4 fact, I think the law would preclude us from asking jurors
5 in deciding whether damages should be awarded and how much
6 damages should be awarded to consider all of the things that
7 lawyers consider when they evaluate a case, right, which
8 would include things like the quality of the judge or the
9 philosophy or proclivities of the judge, whether the
10 jurisdiction is a plaintiff or defendant-friendly
11 jurisdiction, how good the lawyers are, how much time has
12 been spent in developing the case, all of these kind of
13 legal strategic things. Right?

14 You would agree that that is what really goes
15 into or at least it plays a prominent role in any assessment
16 of the value of a case. Right?

17 MR. MCGOWAN: I think with respect, Your Honor,
18 I would provide qualified agreement. I think that might
19 reflect the litigation side, but I would not presume, and
20 certainly I don't think there has been a proffer to this
21 effect, that that is what the business discussions are
22 about, because the business discussions from the buyer's
23 side are, we're going to buy the stock of this company. We
24 see there's litigation out there and we need to pick a
25 number to protect ourselves.

1 It would surprise me, quite candidly, if the
2 only thing the businesspeople talked about were things that
3 business lawyers don't do day to day, which is proclivities
4 of judges, this and that.

5 I certainly would not assume that the
6 discussions that are the subject of the present motion would
7 exclusively bear on specific factors unrelated to the
8 business of the defendant, the infringement of the defendant
9 and the economic consequences of that infringement. It
10 would surprise me if there were only litigation tactics
11 discussed in a merger where you've got corporate people
12 talking to each other. If that's the testimony, then that
13 would be the testimony, but we don't know that and I don't
14 think we can assume it.

15 THE COURT: All right. Now, this is a stock
16 acquisition. Right? You mentioned that?

17 MR. McGOWAN: That's what the letter of intent
18 states.

19 THE COURT: What was the ultimate transaction?
20 In what form did it take? How was it structured?

21 MR. McGOWAN: I don't have the answer to that
22 question at my fingertips. I believe it was consistent
23 throughout, but I need to look that up.

24 So --

25 THE COURT: So you don't know if it was a stock

1 acquisition or a merger, or we just don't know. All we know
2 is that at the time of the negotiation, Bio-Rad wanted to
3 buy stock. Right?

4 MR. MCGOWAN: At the time of the letter of
5 intent on which the Magistrate relied, the letter of intent
6 recites a stock date.

7 THE COURT: Right.

8 MR. MCGOWAN: And I have nothing to contradict
9 that.

10 THE COURT: And I might have overstated it.
11 Right? It's not that -- I mean, it's probably more precise
12 to say Bio-Rad was interested in purchasing stock.

13 MR. MCGOWAN: Correct. It is a nonbinding
14 letter on the system, and in our view, that distinguishes it
15 from most of, on whole of the common interest case law,
16 which there found to be a common interest.

17 THE COURT: Right. So I go back to understand
18 how exactly this was presented to the Magistrate or how it
19 ought to be presented today. You know, in footnote 3 you
20 write, 10X is not seeking attorney files or mental
21 impression, but rather information concerning the
22 negotiation of the agreement between counterparties, but
23 then the questions you cite, at least a lot of them, go to
24 the content of the virtual data room.

25 So maybe, I mean, is it fair to say that really,

1 you're not pursuing, you don't need to know what's in the
2 data room? All you want to know is what was said across the
3 table?

4 MR. MCGOWAN: What we're pursuing in this
5 submission is the across-the-table communications. That
6 would be for the e-mails.

7 THE COURT: And you had an agreement, I think,
8 right, that there would be no logging of documents that
9 postdate the beginning of the litigation. Is that right?

10 MR. MCGOWAN: That is correct.

11 THE COURT: And you want what? A 30(b)(6)
12 witness to come in and just answer questions about what was
13 said to Bio-Rad during the negotiation. That's, at the end
14 of the day, what you want. Is that fair?

15 MR. MCGOWAN: Fair. Yes, Your Honor.

16 THE COURT: All right. Anything else you want
17 to bring to my attention?

18 MR. MCGOWAN: The only point that I'd like to
19 make is that I believe that this can be done simply on the
20 law just by looking at Rule 26, because in our view, the
21 across-the-table communications and work product in the
22 first instance.

23 THE COURT: Wait, we had a technical glitch.
24 Can you repeat that because I don't know what you said
25 between privilege and work product, so can you just start?

1 MR. MCGOWAN: Sure.

2 THE COURT: What did you say? We can resolve by
3 looking at Rule 26 because what?

4 MR. MCGOWAN: Because we don't believe the
5 across-the-table communications are work product in the
6 first instance, and we believe the Magistrate treated them
7 as being work product.

8 THE COURT: Well, I mean, look, and this may
9 be -- I mean, they could be work product to the extent if
10 somebody from 10X said, my lawyer told me X, Y and Z because
11 she thought blank because she thought A, B and C, I mean,
12 that's work product. Right? It's communicating work
13 product. You would argue it's waiving it, but the point is,
14 it is conveying the mental impression.

15 MR. MCGOWAN: Right.

16 THE COURT: And you said you're not interested
17 in getting those. So that's why you, you know, say you're
18 not seeking attorney mental impressions, so it seems to me
19 based on that footnote, you shouldn't get to get work
20 product even if it were weighed during the negotiation.

21 MR. MCGOWAN: And I apologize if it's unclear.
22 I think that if a statement is made across the table,
23 that's, A, not work product; and, B, if there were work
24 product, it would be waiver, and we can talk about the
25 Philippines case and selective waiver and all the rest.

1 What we're trying to indicate in that footnote
2 is, we're not trying to dive down into the underlying
3 documents and the litigation files. We're trying to
4 distinguish what we're asking for in the Hewlett-Packard
5 case, Sealed Air case, where they are trying to go down into
6 the litigation files. We're trying to stay across the
7 table.

8 If across the table a lawyer or a businessperson
9 in a corporate setting recites something, then that
10 recitation is not work product, and it's strictly a waiver
11 analysis, we think the error that we want to draw to the
12 Court's attention is in treating those statements themselves
13 as work product.

14 I believe the law on waiver would establish that
15 the communication constitutes a waiver because we don't have
16 the facts that were put within the common interest stock,
17 but the distinction we're trying to draw is between
18 litigation files and across the table, and I apologize if I
19 was not clear on that point.

20 THE COURT: Well, that's all right. But, see,
21 you know, the thing is, work product, it's a different test
22 whether work product has been waived. And would you agree
23 that at least there are circumstances where an NDA -- let me
24 start again.

25 There are circumstances where parties share

1 attorney impressions pursuant to an NDA and there would be
2 no waiver because under Westinghouse, they did take
3 appropriate measures to try to guard the secrecy of that and
4 limit the distribution of that work product?

5 MR. McGOWAN: I think that the answer to Your
6 Honor's question is a qualified yes. The qualification
7 comes from the requirement in the common interest cases that
8 there be a common legal interest as this Court said, in the
9 Dow chemical case, such as co-defendants or anticipation of
10 joint litigation.

11 Just for the record, I think that the rule on
12 this is stated in the Philippines case, the Republic of the
13 Philippines case at page 1429, where the Court says, a party
14 who discloses documents protected by the work product
15 doctrine may continue to assert the document's protection
16 only when the disclosure furthers the doctrine's underlying
17 goal.

18 I agree that work product and privilege have
19 some different aspects. The purpose of work product is to
20 prepare for trial. Rule 26 says, in anticipation of
21 litigation or for use at trial.

22 It is not anything that happens because
23 litigation is out there. It's not the case that if I have
24 to rent extra office space in order to accommodate the files
25 of the case, that the lease agreement becomes work product

1 and is subjectively the reason I did it is because of the
2 litigation. It's a purpose driven doctrine, and the point
3 is whether the communication in question furthers the
4 purpose of the doctrine.

5 In the Hewlett-Packard case and the other common
6 interest cases in Maine, disclosures are found within a
7 common interest when there is a common interest such as
8 being joint defendants, and the disclosure relates to that
9 interest.

10 THE COURT: Right. Now, on this though, let me
11 just stop you, because you didn't argue any of this to the
12 Magistrate. Right?

13 MR. McGOWAN: I think that before the
14 Magistrate, I think that what we did is argue that -- we
15 argued the instruction we got. We did not understand at the
16 time that they were going to claim that, the defendant was
17 going to claim that the negotiations were themselves work
18 product, so what we argued was the common interest point.

19 THE COURT: Right. But, see, in fairness to
20 them, I know you apologized for it. You don't need to
21 apologize, but you have.

22 I mean, I go back to how you presented it in
23 footnote 3. You said you're not seeking attorney files or
24 mental impression, and that's why I began the conversation
25 by just talking about dissatisfaction on my part in the way

1 the thing was teed up. I'm not faulting anybody, but just
2 that's the reality. And a lot of the questions in the first
3 deposition were really designed to find out what was in the
4 data room, and I could see in the data room there being what
5 would normally be called work product, like opinions of
6 counsel about validity or invalidity of patents, things like
7 that.

8 MR. MCGOWAN: Sure.

9 THE COURT: But I'm just going to tell you right
10 now, I mean, I think you've waived your right to pursue that
11 because of the footnote, the content of the footnote says
12 it, and it sounds like you're not pursuing the data room
13 documents anyway. So I think that I'm just going to go
14 ahead and say that's the way I am going to rule, that you
15 have -- by footnote 3, you waived your right, or at least
16 you didn't tee up, and it's too late to do so now, to find
17 out or obtain documents that would reflect the mental
18 impressions of attorneys.

19 And, furthermore, it sounds like this morning
20 you're saying you are not even pursuing documents from the
21 data room at this point. You want to limit the scope of
22 your discovery requests to oral and e-mail communications
23 between the parties between December 2019 and April of 2020.
24 Is that right?

25 MR. MCGOWAN: Yes. And just to go back to the

1 point you just made, it was at the end of footnote 3 where
2 we say we're not seeking mental impressions, but information
3 concerning the negotiation of the agreement. What we're
4 doing, in fairness, I think is consistent with the
5 negotiations point even in that footnote.

6 THE COURT: Well, but I raised it because I
7 think it explains why -- you know, you say you didn't raise
8 these, this issue of Westinghouse or what's the purpose of
9 the disclosure. You're faulting 10X. I'm sorry. You're
10 faulting Celsee, and I'm not finding that very persuasive.
11 It sounds like you have raised cases in the first instance
12 before me that weren't addressed to the Magistrate.

13 MR. MCGOWAN: May I have one brief response to
14 that, Your Honor?

15 THE COURT: Sure. Go ahead.

16 MR. MCGOWAN: As I said before, when we were
17 going through exhibits, Exhibit G, by focusing on
18 communication, we were focusing on the line of inquiry where
19 the objection was straightforwardly common interest. I
20 don't think that there was any effort made at any point in
21 time to establish that a negotiating statement is a work
22 product statement, but the briefing before the Magistrate
23 focused on the question whether there was a common interest,
24 and we discussed the Hewlett-Packard cases on most of those.
25 But I don't believe there was ever any effort to establish

1 that the communications were themselves work product. The
2 objection of the 30(b)(6) deposition, a common interest
3 privilege.

4 THE COURT: Well see, I disagree. That's why I
5 read it to you at the outset. I mean 291:

6 Question: Did the parties discuss in connection
7 with negotiating this nonbinding letter of intent whether
8 that escrow holdback would include some for the 10X
9 litigation?

10 Mr. Younkin: Instruct the witness not to
11 answer that question on the grounds it calls for work
12 product. That sounds like a work product objection.

13 MR. MCGOWAN: Right, but I was referencing the
14 30(b) deposition.

15 THE COURT: Well, okay. All right. But you
16 cited before the Magistrate, and I thought that was -- the
17 discovery issue is related to both depositions.

18 MR. MCGOWAN: It is. The more specific to the
19 communications in the negotiation I think is the 30(b)
20 instruction. That's the point that I'm making.

21 THE COURT: Okay. All right. We have narrowed
22 it now, I think. We have narrowed it to all you want are
23 oral and e-mail communications between December '19,
24 April 2020, between Celsee and Bio-Rad relating to the
25 escrow and fees, expenses and damages relating to this

1 case.

2 MR. MCGOWAN: I would say the litigation. I
3 don't know if there are things that are --

4 THE COURT: Okay.

5 MR. MCGOWAN: -- related to the escrow that are
6 in there, because we don't know what was said yet.

7 THE COURT: Right.

8 MR. MCGOWAN: A fair summary.

9 THE COURT: Okay. That's where we are. All
10 right. And you want to also get from that any statements
11 that may have conveyed attorney mental impressions?

12 MR. MCGOWAN: Yes. Anything that was said back
13 and forth, our view is not work product in the first
14 instance, and if it happened to convey work product does not
15 fall within the common interest exception for waiver.

16 We have not discussed the details of the
17 exception a lot, but it catches out to just what the Court
18 said. If there is a mental impression and an
19 across-the-table statement, our request is that that would
20 have to be disclosed as well. What doesn't need to be
21 disclosed are the things sitting in the files themselves
22 or things just sitting in people's heads that were not
23 stated.

24 THE COURT: Okay. And then on the merits -- I
25 don't know if it's the right word, but on the common

1 interest issue, I mean, your position is it's a non-binding
2 letter, the negotiating across the table from each other.
3 It's a stock acquisition, so it's not like Bio-Rad has taken
4 on the defense of this litigation and so the cases that are
5 cited by 10X are inapposite. Is that a fair summary?

6 MR. MCGOWAN: Fair summary, Your Honor. Yes.

7 THE COURT: Okay. All right. Let me hear from
8 the other side then.

9 MR. YOUNKIN: Thank you, Your Honor. This is
10 Jeremy Younkin.

11 I think if I may just at the outset point out
12 that there were really two independent grounds for the
13 Magistrate Judge's decision, and so one of them was the
14 squarely work product.

15 And so as we have discussed today, 10X stated in
16 their footnote that they were not interested in attorney
17 mental impressions, and then the Judge asked, well, why do
18 you want this information?

19 And they said, because we think, as we've heard
20 today, that the negotiation is going to reflect the parties'
21 views about the value of this case. And, indeed, I think
22 Mr. McGowan has made it clear, it's their theory this
23 evidence is relevant because, you know, it's going to
24 reflect, you know, quote, "how worried we should be and what
25 are the underlying merits of the action and what are the

1 potential damages."

2 And when Magistrate Judge Fallon heard that, she
3 said, I can't think of a clearer example of work product,
4 and then she said, that work product protection was not
5 waived because it is difficult to waive work product. You
6 need to do something that allows your adversary to find out
7 the information, and that was not done here.

8 Celsee and Bio-Rad were talking to one another
9 under a nondisclosure agreement about an acquisition and
10 there was really no risk that 10X was going to get the
11 information and so work product protection applies and it
12 wasn't waived, full stop. I mean, and that standing alone
13 without even getting into common interest case law provides
14 grounds to affirm Magistrate Judge Fallon's decision and
15 finds --

16 THE COURT: But I mean I feel bad for Magistrate
17 Judge Fallon because I just think the way it was teed up was
18 kind of unfair to her.

19 So let's go to the transcript that you've just
20 recited. What page are you on?

21 MR. MCGOWAN: Well, her statements, if you look
22 at the very end on page 38 of the transcript.

23 THE COURT: Right.

24 MR. YOUNKIN: She says, in addition, even
25 putting aside the common interest doctrine, so she is taking

1 that out of the equation, the work product doctrine affords
2 an additional basis for protection of the information that
3 plaintiffs plaintiff seeks to compel.

4 THE COURT: Right. Now, you know, it's not
5 clear to me. What is she talking about? The information
6 the plaintiff seeks to compel? What's the information the
7 plaintiff seeks to compel that she's referring to?

8 MR. YOUNKIN: I think what she's referring to
9 are the communications between Bio-Rad and Celsee about this
10 litigation. And so the way that this kind of came up, Your
11 Honor, if you turn to page 28 of the transcript --

12 THE COURT: Right.

13 MR. YOUNKIN: Okay?

14 THE COURT: I'm there.

15 MR. YOUNKIN: Okay. So this is Mr. Novikov
16 arguing about why he says the negotiations of the escrow
17 provision are not subject to common interest, and I will
18 just point out that Mr. Novikov opened with this argument
19 and so clearly 10X understood --

20 THE COURT: Sorry, sorry. What line were you on
21 and then start again.

22 MR. YOUNKIN: Page 28. 28, Line 7.

23 THE COURT: Okay. All right. Got you. Thanks.

24 MR. YOUNKIN: Okay. So this is 10X arguing, and
25 they say that their assessments, meaning the Bio-Rad and

1 Celsee's assessments or representations as part of that back
2 and forth about how much this litigation is worth, and then
3 what financially they view the risk to be is certainly
4 highly relevant to a number of issues. And so Judge
5 Fallon's reaction to that is found on page 36.

6 THE COURT: Okay.

7 MR. YOUNKIN: And if we look at line 16 --
8 sorry, the beginning of that paragraph around line 10, she's
9 talking about these communications. I think there, clearly
10 we're talking about the communications between Celsee and
11 Bio-Rad about the escrow provision.

12 And then at line 16, she says, these go to the
13 very heart of what the parties think about what this case
14 ending in litigation is worth, and I can't think of a clear
15 example of what might be protected by the work product
16 privilege.

17 And, indeed, we've heard today that their whole
18 theory of this evidence is that it will reflect each party's
19 mental impressions about this litigation -- the strengths,
20 the weaknesses, the damages. And that sort of evidence
21 is -- it's just product information.

22 THE COURT: Hold on. I agree with you. All
23 right. So on that statement, I do understand that, and I do
24 think there's no question about it. Then I think we've got
25 an issue about whether there's a waiver of disclosing it.

1 MR. YOUNKIN: Okay.

2 THE COURT: And so the way I look at it is that
3 because of footnote 3, that wasn't teed up. In other words,
4 the way I look at it is the footnote 3 -- sorry. Hold on
5 one second.

6 There it is. In footnote 3, the statement that
7 10X does not seek an attorney files for mental impression.
8 So as far as I'm concerned, they don't get to get -- they
9 are not asking the Magistrate to force them, to force a
10 disclosure of mental impressions. That wasn't teed up and
11 so I'm going to affirm the Magistrate to the extent that she
12 said that on page 36 that Celsee's evaluation, or, rather,
13 Celsee's attorney's evaluation of the case is quintessential
14 work product, I think that's true. And why I am going to
15 affirm her, I'm not sure this is the reason she made the
16 ruling, but I'm going to affirm it is, you can't in a, what
17 is effect effectively a motion to compel, which is the
18 letter dated September 21, 2020, at DI 204, you can't say
19 you're not seeking attorney files or mental impressions and
20 then expect to get them.

21 So I don't have to get into whether or not there
22 was a waiver of work product during the course of these
23 negotiations or not because that issue in my mind wasn't
24 properly brought up to the Magistrate, and, in fact, it was
25 essentially -- it was waived, and so I'd affirm her on that

1 issue.

2 So now what I think is left though -- well,
3 what's left in the negotiation and the back and forth, okay,
4 where there's not a disclosure by Celsee about the
5 impressions of their attorney as far as valuing the case,
6 but there are negotiations, other statements they made that
7 do not reveal work product.

8 Now, why shouldn't 10X get that information?

9 MR. YOUNKIN: Well, I don't think actually that
10 they are seeking that information. I mean, I think --

11 THE COURT: Well, I mean, I think Mr. McGowan is
12 seeking that information.

13 Mr. McGowan -- wait. Let me just ask him
14 because I thought it was pretty clear, that's what he wants.
15 He just wants as well any disclosures that included work
16 product.

17 Mr. McGowan, that's what you are seeking.

18 Right?

19 MR. McGOWAN: The Court is correct. If it's
20 across the table, it s the subject of our submission to the
21 Court.

22 THE COURT: Right. But, okay.

23 MR. YOUNKIN: Okay. But I think we're
24 potentially talking past each other here. I mean,
25 Mr. McGowan's position is anything said across the table he

1 wants, and I think Your Honor just said, well, if it's work
2 product material, you don't get it.

3 THE COURT: Correct.

4 MR. YOUNKIN: And so my -- right.

5 THE COURT: But there's still a lot of other
6 information. I mean, in other words, a person across the
7 table could say, he could say, I think the case is worth
8 this much, or she could say, I don't know who the 30(b)(6)
9 witness is going to be. She could say, you know, we think
10 the case is worth this much, or she could say -- I mean, she
11 could make revelations about a lot of stuff without
12 disclosing work product.

13 MR. YOUNKIN: Your Honor, I disagree with that.
14 I think if somebody says I think the case is worth X, that
15 is a disclosure of -- I mean, that's protected by the work
16 product, because that is one party telling the other party
17 its mental impression about the value of the litigation,
18 which is, of course, informed by, as I said, that's clearly
19 a mental impression about the value of the case.

20 And so --

21 THE COURT: Hold on. Attorney work product goes
22 to the attorney's mental impression. Now, the client might
23 agree with the attorney or disagree with the attorney, but
24 the client's ultimate mental impression is not the
25 attorney's mental impression.

1 The other thing is, and I'm sure you're
2 familiar, I mean Upjohn, all the work product cases
3 distinguish between fact and opinion. And so what I want
4 you to focus on now, so this is the issue. I'm basically,
5 I'm not going to allow Celsee to get a disclosure of the
6 mental impressions of 10X's attorneys. Okay? They've
7 waived that by their footnote. So to that extent, I'm
8 affirming the Magistrate.

9 What remains to be decided is, what about the
10 rest of the negotiation? And I am concerned that the
11 Magistrate Judge read too much into AgroFresh. I'm
12 concerned that AgroFresh and the other cases upon which you
13 rely don't really apply here, and yet I'm also concerned, as
14 I mentioned in my questioning of Mr. McGowan, about how
15 probative is this stuff and is it even worth the burden
16 of a deposition.

17 And, you know, I see where you drop a footnote
18 in your papers in front of me based on relevance, but did
19 you do that in front of the Magistrate? Did you argue
20 proportionality or burden or relevance in front of the
21 Magistrate?

22 MR. YOUNKIN: I believe that I noted it during
23 the hearing, Your Honor, but really, the way that the issue
24 was teed up was, it was an argument to that privilege
25 instructions given at a deposition were improper, and so

1 that was their argument, and so we were defending the
2 privilege instruction.

3 I did note at the hearing that the relevance
4 argument seemed a bit stretched, but certainly, we weren't
5 instructing the witness not to answer a question at a
6 deposition based on relevance grounds.

7 I do think --

8 THE COURT: I've got the transcript in front of
9 me, where did you say that or something about burden,
10 relevance, or any considerations, proportionality?

11 MR. YOUNKIN: Yes. And this may have been --
12 this may have actually been in connection with the first
13 argument.

14 Yes. I mean, so to be clear, the statement is
15 that I was referring to is on page 19 and it really is
16 dealing with the first of the two arguments that were before
17 her.

18 THE COURT: Okay. So the bottom line is, you
19 really didn't argue proportionality or overly burdensome or
20 even relevance as a basis to prevent further deposition of
21 this 30(b)(6) witness. Correct?

22 MR. YOUNKIN: Not with respect to this argument.
23 That's right.

24 THE COURT: Okay. So then I think we're stuck.
25 Right? So then I do have to, it looks like, address the

1 common interest doctrine and whether it applies. Is that
2 fair?

3 MR. YOUNKIN: I actually don't think that that
4 is correct, Your Honor, because I think that the waiver, the
5 waiver rules around a work product are much more stringent
6 than the waiver rules --

7 THE COURT: I'm not going to give them work
8 product. I've already said that. You've won that.

9 MR. YOUNKIN: They don't -- okay. I think there
10 is still an open question about the limits of that though,
11 because, firstly, I do need to say that the work product
12 doctrine does not just protect attorney mental impression.
13 It also protects the mental impressions of a party about
14 litigation, so that's number one.

15 Number two --

16 THE COURT: All right. So, wait. Now, this is
17 an example of, unfortunately, you guys are asking me to make
18 a pretty, you know -- there are few things more important
19 than attorney/client privilege and attorney work product.

20 Do you have a case that says that if I ask a
21 client about the client's mental impressions, that that is
22 prohibited by the attorney work product doctrine?

23 MR. YOUNKIN: Well, Your Honor, yes. I think
24 that just the plain language of Federal Rule of Civil
25 Procedure 26(b)(3) --

1 THE COURT: All right. Hold up. Let me pull it
2 up. 26 what?

3 MR. YOUNKIN: (b) (3) .

4 THE COURT: Okay.

5 MR. YOUNKIN: Okay. So, and this is Section A.

6 THE COURT: All right.

7 MR. YOUNKIN: Which is basically the work
8 product rule. And it says, ordinarily, a party, 10X, may
9 not discover documents and tangible things that are prepared
10 in anticipation of litigation or for trial by or for another
11 party, another party, or its representatives, including the
12 party's attorney.

13 And so a party, you know, a company gets a
14 demand letter or something and the CEO works on it and forms
15 a mental impression about the value of the case. That can
16 clearly be work product. And so when you have --

17 THE COURT: Well, I didn't say it couldn't be,
18 but --

19 MR. YOUNKIN: I was just trying to make the
20 point that work product protection is not limited to an
21 attorney's mental impressions, that it also covers a party's
22 mental impressions about a litigation. And here, that's all
23 they want. All they want is a party's mental impressions
24 about this case, and I think Judge Fallon heard that and she
25 said, that's clearly work product. You don't get that.

1 And, you know, I think in this case, too, I
2 mean, attempting to tease out, you know, even if you were to
3 say, well, okay. Let's try to distinguish the lawyers's
4 mental impressions from the negotiators mental impressions,
5 I mean, I'm not even sure how you could possibly do that,
6 which is why I say, they're only interested in the mental
7 impressions. If the discussions do not reveal or reflect
8 what a party thinks about this case, they don't want them.
9 That's their whole theory of relevance here, which is why I
10 think the Magistrate Judge said, that's what sounds like
11 what you want is work product. You, 10X, have to show
12 waiver of work product and you can't do that because the
13 parties were talking under a nondisclosure agreement and
14 there is no risk that that information would get to 10X.
15 And you can do that just based on the waiver rules around
16 work product without even delving into, you know,
17 Hewlett-Packard and the common interest body of case law.
18 It's just independent grounds of affirmance.

19 And I do not think --

20 THE COURT: So let me just ask you this. Let's
21 say Bio-Rad at the last minute said, we're not doing this
22 deal and, or let's say Celsee said we're not doing it and
23 then Bio-Rad sued Celsee. Are you telling me that those
24 negotiations, they would never see the light of day in a
25 Court if there was a dispute over the meaning or, you know,

1 the way the negotiations went?

2 MR. YOUNKIN: I don't know the answer to that
3 question, Your Honor. I mean, I think it's possible in that
4 situation that --

5 THE COURT: Well, it happens all the time. It
6 happens all the time when there's a negotiation that doesn't
7 get consummated or gets consummated and the parties argue
8 about it. As long as parol evidence is admitted, if you
9 have then an ambiguous contract or something, this is the
10 kind of evidence that comes in under the parol evidence
11 rule.

12 MR. YOUNKIN: Well, the parties -- the parties,
13 of course, are free to waive work product if they decide to
14 in a litigation, and here, that's not being done. The
15 parties are, you know, making their work product objection.

16 I also want to make just one point about it
17 seems like Mr. McGowan is drawing this distinction between
18 the documents in the data room, which he, I think, now
19 concedes is off-the-table and communications that were made
20 in a negotiation, but there's no reason to draw a
21 distinction between those two things. It's just, it's just
22 the form of communication.

23 And so if we all agree that if an opinion of
24 counsel gets put into the data room and there's no waiver,
25 then the same thing should apply if the contents of the

1 opinion of counsel are disclosed in an oral communication or
2 an e-mail.

3 THE COURT: I don't think he said that and I
4 don't need to rule on that because I've already said he
5 doesn't get work product. He doesn't get work product
6 because they took the position in footnote 3 that they
7 weren't seeking it. All right.

8 So the only question is, do they get the
9 communications that went back and forth between the parties.
10 I mean, to me, I mean, I don't think it has huge probative
11 value, but as you said, you didn't make that argument.

12 Now, the good question is, you know, they're
13 making a new argument, you could argue, so can I just
14 consider now, like what's the relevance of this material?
15 What would be the burden to produce it? But you have not
16 said anything in that regard even though I've asked.

17 MR. YOUNKIN: Well, I mean, I think that I mean
18 I would point to the footnote that we make in the response
19 to the objection, and I would also say that the
20 circumstances have changed a bit because, you know, where we
21 find ourselves right now is November 5th, the plaintiffs
22 served an opening damages report, so we already have their
23 expert opinion on what she thinks the damages in this case
24 should be, and we're about to serve our rebuttal report on
25 Friday, tomorrow.

1 And then what they want to do is have a
2 deposition in the next couple of weeks, I guess, that they
3 think is going to uncover evidence that's going to bear on
4 damages, and so then what are we going to do? Supplemental
5 reports, you know, as we head towards summary judgment in
6 February?

7 I mean, just from a practical standpoint, you
8 know, it's going to be difficult. Like I said --

9 THE COURT: Have you considered what kind of
10 burden it would take to go review all the different e-mails
11 and communications between 10X and Bio-Rad? You didn't log
12 the material. Right? Have you even conducted a search for
13 the material?

14 MR. YOUNKIN: I don't, I don't know the answer
15 to that question. You know, these requests, the requests
16 for the Bio-Rad discussions in particular came in pretty
17 late in discovery. We objected to them. There was a little
18 bit of hashing things out. But I mean I think that we have
19 been pretty clear that we weren't going to produce these
20 communications, you know, going way back.

21 And, really, I mean, the issue really got teed
22 up around this, the deposition as opposed to responses to
23 document requests. But like I said, Your Honor, I think
24 that we still have to address this issue of we all agree
25 that they're not entitled to work product information, but I

1 think it still leaves open a question, well, what is work
2 product information? And Judge Fallon said, communications
3 about this litigation are covered by the work product
4 doctrine, and that conclusion, we submit, is not clearly
5 erroneous, and 10X has not shown that it was.

6 They are not asking for communications about,
7 you know, some random provision in this merger agreement.
8 They are asking for communications about the litigation.
9 That's all they care about.

10 THE COURT: Well, there was no work product
11 objection lodged to the 30(b)(6) witness. Right? It was
12 based solely on the objection on the common interest
13 exception.

14 MR. YOUNKIN: But the common interest exception,
15 I mean, I don't think that's mutually exclusive of work
16 product. Really, what the common interest exception is
17 saying, the underlying privilege was not waived. And, by
18 the way, the LaPointe deposition happened first, and so they
19 understood kind of what our position was, I think, and if
20 they had any questions about it, they could approach further
21 with Mr. Stark, the witness who is actually involved in the
22 negotiation, and they didn't.

23 And so they asked him specific questions. You
24 know, what were the considerations that led to this escrow
25 provision? And I was there and I objected to work product

1 grounds. And as I think you said, it really couldn't have
2 been clearer.

3 And then in the meet-and-confer, which
4 Mr. McGowan didn't attend, work product was featured. I
5 mean, I was telling Mr. Novikov that I thought that work
6 product prevented him from getting this information. And so
7 they understood this was an issue, which is why they dropped
8 a footnote to address it briefly in their letter.

9 And then when we got to the argument,
10 Mr. Novikov opened up by arguing that communications about
11 this negotiation, about the negotiation of this merger
12 agreement are not covered by the work product doctrine.

13 So that was aired, and the Magistrate Judge
14 disagreed and said, no, that those communications are
15 covered by the work product doctrine.

16 THE COURT: So why don't you explain to me why
17 communications with another party that's trying to buy, is
18 interested in purchasing your stock, why would my
19 communications with that entity constitute work product?

20 MR. YOUNKIN: Because the content of the
21 communication is a mental impression about the litigation,
22 and so just as a side note here, the deal is being
23 characterized as a stock deal. I mean, this is an
24 acquisition. Right? Bio-Rad bought it. They own it now.
25 It's not just they bought ten percent of the shares or

1 anything like that. Bio-Rad purchased, acquired,
2 100 percent of Celsee.

3 THE COURT: Okay.

4 MR. YOUNKIN: But so if there's a negotiation
5 happening and under an NDA where a defendant in a lawsuit is
6 talking about somebody who wants to buy them and the
7 defendant says to the potential acquirer, let me tell you my
8 mental impressions about this litigation, okay. So what is
9 being communicated is a mental impression that had been
10 formed in connection with the litigation.

11 And the disclosure of that mental impression to
12 the other side is not a waiver in the same way that, you
13 know, if you had -- you know, a general counsel sits down
14 and says something like, you know, here are the defenses to
15 this, to this claim, here are the arguments that I think,
16 you know, are good ones that we're making, those are his or
17 her mental impressions. And if you disclose that to a
18 potential acquirer under an NDA, under the very strict rules
19 surrounding waiver, which they had the burden to prove,
20 there is no waiver, and that's what Judge Fallon held and
21 she was correct.

22 THE COURT: Well, I'm having a hard time. You
23 know, you cite 26(b)(3)(A). I mean, that deals with
24 documents and tangible things. So, A, that is off the
25 table. We're not talking about that. We're talking about

1 conversations, number one, and then we're talking about
2 e-mails that are sent to Bio-Rad. They are not in
3 anticipation of litigation. I mean, you've got to
4 demonstrate to me why they would be.

5 I get where it may be within those documents
6 they are conveying what 10X's lawyers thought about the case
7 and they are not getting that. We've already discussed
8 that. So I want us to go back and narrow the scope of what
9 is really being addressed.

10 Now, I do think it's, you know, it's informative
11 that they are buying all the stock, so they are taking over,
12 they're basically taking over the case, and they are, is it
13 fair to say then they are at least indirectly inheriting the
14 liability in the litigation in your view?

15 MR. YOUNKIN: I mean, subject to the terms of
16 the merger, which address this.

17 THE COURT: Okay. What does it address? What
18 does it say?

19 MR. YOUNKIN: Well, there are -- I mean, there
20 are --

21 THE COURT: Actually, what does the letter of
22 intent say? Let's focus on that, about what happened to the
23 litigation.

24 MR. YOUNKIN: The letter of intent says that
25 Bio-Rad will acquire a hundred percent of Celsee, and then

1 it goes through some of the money payments. I do not
2 believe that it talks about -- you know, then it says we're
3 going to do due diligence and it doesn't mention the
4 litigation, I don't think, just looking at it quickly,
5 expressly.

6 The merger agreements does contain provisions
7 that squarely address the litigation, including how it's
8 going to be paid for, and those are, those are the
9 provisions that 10X wants discovery on.

10 But, again, if you have -- let's just say you
11 have two businesspeople sitting across the table from each
12 other and one businessperson says, as Mr. McGowan asked, how
13 worried should we be? How could that question possibly be
14 answered without revealing the attorney's mental impression?

15 THE COURT: Very easily. You just don't
16 disclose what your attorney said to you or wrote to you.

17 MR. YOUNKIN: But the negotiators, the
18 negotiators's view on that is inextricably tied to what his
19 lawyers are telling him. A businessperson is not an
20 independent view of the potential liability separate and
21 apart from information that has been given to him by
22 lawyers. No way is he forming a judgment about that.

23 THE COURT: Well, I don't find that argument
24 very compelling.

25 So, Mr. McGowan, here's where I am. It just

1 strikes me that I don't see how I would let into evidence in
2 front of a jury any statements that were made during the
3 course of the negotiations, because I think if I applied
4 Rule 403, I would conclude that the probative value here
5 would be substantially outweighed by a number of
6 considerations. I think it would confuse the jury and
7 potentially mislead the jury because I don't think any of
8 the statements that might have been made during the
9 negotiation with respect to the value of the litigation or
10 potential damages award, I don't think that it would be --
11 it would be fair or proper to have the jury try to parse,
12 well, how much of that is based on things that the jury
13 should never think about, some of the legal strategies and
14 assessments about juries, about judges. I just think it
15 would -- and I think the probative value is limited.

16 Now, I have not heard anything about burden
17 from 10X, but I really just question why we need to have
18 teed up --

19 MR. MCGOWAN: May I respond, Your Honor?

20 THE COURT: Yes. Sorry. I was hoping you
21 would. Thanks.

22 MR. MCGOWAN: I just wasn't sure if the Court
23 was concluded.

24 Let me suggest that a 403 ruling usually has the
25 benefit of the proffered testimony, so there's something

1 concrete to rule on. Part of the discussion we've just been
2 having is hypothesizing what the testimony might be, and if
3 Bio-Rad comes in and makes its own statement, that's what
4 we've looked at. Says, yes, we've got a problem there. It
5 feels very different from the kind of hypotheses that 10X's
6 counsel was just making.

7 I think the way to cut through all of this is to
8 actually adduce the testimony respecting the Court's work
9 product, the way the Court has ruled, but the Court I think
10 is correct, that that is not everything. And I agree that
11 back and forth across the table in a merger in a hundred
12 percent stock acquisition, I don't think that makes a
13 difference in the common interest doctrine. But I think
14 that kind of evidence comes in all the time. I don't think
15 there's a plausible work product decision there.

16 So I think the way to cut through this is to
17 respect the Court's ruling that it has made on work product,
18 recognized that there was some residuum, then find out what
19 it is and then have a concrete piece of testimony or a
20 concrete question that can be addressed. That's what I
21 would suggest.

22 I feel as though making assumptions about what
23 might be the case is not a good way to resolve the question
24 of admissibility or a question of burden when that hasn't
25 really even been briefed.

1 And --

2 THE COURT: Well, I said, I used the conditional
3 language when I said it, and I said it with the hope that
4 you might think the odds of it coming in are so minimal,
5 that you wouldn't pursue it. But you are not willing to do
6 that, and I'm not making a definitive 403 judgment because I
7 don't have something specific in front of me. I was just
8 sharing with you my general thought process based on your
9 explanation of how this information you hoped to get would
10 be probative. It is just I didn't find it really, really
11 compelling.

12 MR. MCGOWAN: Sure. If I can just -- let me
13 just -- I don't want to dwell too much in hypotheticals, but
14 the Court alluded earlier to the idea that, well, maybe
15 Bio-Rad makes a comment that is not -- and a Celsee person
16 agree with it.

17 THE COURT: Wait. You broke off again. You
18 said Bio-Rad makes a comment and then I lost you.

19 MR. MCGOWAN: And then a Celsee person agrees
20 with it and says, yes, that's true. That could be a
21 liability issue, not a damages issue. That's a response to
22 a comment. That's not work product in any respect.

23 Now, what the Court would do with that, would
24 think about that in a 403 context would depend, I think, on
25 the question, and the Court would have something concrete to

1 look at. But I really feel as though with respect to the
2 Magistrate's ruling, that the premise that the non-mental
3 impressions across the table testimony is not work product,
4 I think that's a matter of law. I don't think there was any
5 foundation laid to show that it's work product and I don't
6 think there has been any laid here.

7 So I think that ruling was incorrect with
8 respect to the traunch of communications the Court has
9 identified this morning.

10 Then the question becomes, if I take the Court's
11 point to be is the game worth the candle with respect to
12 that bit of information. We're looking at a June trial
13 date. I don't think this -- I have not heard a reason why
14 this should take a huge amount of time, but I think that in
15 order to follow the legal rules of work product and
16 admissibility, we really need to see what the evidence is so
17 concrete decisions can be made.

18 MR. YOUNKIN: If I can respond to that?

19 THE COURT: Yes. Sure. Go ahead.

20 MR. YOUNKIN: I mean, you know, Courts make
21 relevance calls all the time before we know what the answer
22 is. That's what -- I mean, when you are ruling on a motion
23 to compel a document request, the question is, you know,
24 what is the question? What are the documents you are
25 seeking and are those relevant? Can you show that they're

1 relevant?

2 And, you know, and prejudice and burden can play
3 a role in that as well. I mean, here, we're here on a
4 motion to compel answers to questions that were asked at a
5 deposition. This shouldn't be, you know, open up, have a
6 whole deposition. They should come in here and say, point
7 to the transcript. Here's the question I asked. It was
8 blocked. I would like an answer to that question.

9 And I don't think that Mr. McGowan can point to
10 any questions that were asked where, you know, he feels like
11 he needs the answer in order to make an argument that, you
12 know, that passes 403 muster.

13 MR. MCGOWAN: May I respond, Your Honor?

14 THE COURT: Sure.

15 MR. MCGOWAN: The instruction given in
16 Exhibit G, the corporate deposition, was a categorical
17 instruction.

18 MR. YOUNKIN: That issue has been waived. I
19 mean, what they asked Magistrate Judge Fallon for was a
20 deposition of Mr. Stark. They did not ask for a new
21 30(b)(6). They didn't ask for Mr. LaPointe to reappear.
22 They said, this is in --

23 THE COURT: All right. So, hold on. This is
24 the first, you know, that somebody has said that to me.
25 Maybe it's in the papers, but this is -- again, I go back

1 to, it just wasn't really presented, at least something that
2 I would grasp immediately. So hold on.

3 So the pending motion is solely to redepose
4 Mr. Stark. Is that right?

5 MR. YOUNKIN: Yes. Footnote 1 in their letter
6 brief to the Magistrate Judge.

7 THE COURT: All right. Hold up. Well, this is
8 made in the context of another argument.

9 MR. YOUNKIN: Well, the proposed order is to
10 produce Mr. Stark to provide deposition testimony as a
11 corporate representative. I mean, Mr. Stark wasn't our
12 corporate representative on any topic. He is a former
13 employee.

14 THE COURT: Okay. So, you know, now I'm looking
15 at it, it does say, Celsee should be compelled to reproduce
16 Mr. Stark to testify as its corporate representative
17 concerning the negotiation of the merger agreement. I mean,
18 that's a 30(b)(6) witness. They want Mr. Stark to be the
19 witness because they think he's probably most knowledgeable,
20 but I mean, they're asking for a 30(b)(6) witness. They
21 just want it to be Mr. Stark. That's on page 3 of your
22 letter, DI 204. I don't think they've waived their right to
23 have a 30(b)(6) witness given that language.

24 Okay. Anything else anybody wants to bring to
25 my attention?

1 MR. YOUNKIN: I mean, we've been going for
2 awhile, Your Honor, so I don't want to belabor the point. I
3 will just say though that I think you have really focused on
4 this one prong of the Magistrate Judge's decision, which I
5 think is fully sufficient to affirm, which is the no waiver
6 of work product, but there is a separate and independent
7 ground around the common interest doctrine, and I think that
8 what, you know, what 10X is trying to do here, you know, and
9 I think that they've been pretty candid about it, is
10 basically get this Court to rule for the first time in
11 Delaware at the Third Circuit that you cannot have a common
12 interest when you're in merger talks. A common interest
13 doctrine simply doesn't apply there.

14 THE COURT: No. So I don't view it that
15 broadly. I mean, frankly, I would prefer not to opine,
16 period, because I don't think -- because of the manner in
17 which the issues were brought to me and brought to the
18 Magistrate. But I don't think they're asking for as broad a
19 ruling as you just said. Am I correct?

20 MR. YOUNKIN: At the hearing they told the
21 Magistrate Judge -- I mean, their position is that
22 Hewlett-Packard was wrongly decided and that it should no
23 longer be followed. And the Magistrate Judge says, well, if
24 I agree with you, is this going to (inaudible) privilege
25 whenever there's a merger?

1 And they candidly said, yes, they would like the
2 District of Delaware to say that Hewlett-Packard was wrongly
3 decided and it's not the law in Delaware. And so that when
4 parties -- and they would like the Court to follow, you
5 know, other cases, like out of Illinois that say that when
6 parties are in a merger negotiation, there's no common
7 interest.

8 It's just not the law in the Third Circuit. I
9 mean, the Sealed Air case rejected that, rejected that
10 argument squarely and then there's a Bankruptcy Court in
11 Delaware that did the same.

12 And so I think that they are candidly saying
13 that they would like, that they would like Your Honor to
14 rule that Hewlett-Packard is not the law of Delaware and
15 that that line of cases --

16 THE COURT: First of all, when you say that the
17 law -- so actually, this gives me a perfect example. In
18 fact, I'm glad. I forgot to raise this and I really should
19 have at the outset, but it's a perfect example of why I mean
20 this is not teed up for me. And let me ask Mr. McGowan
21 first.

22 Mr. McGowan, are you there?

23 MR. MCGOWAN: I'm here.

24 THE COURT: So what law of privilege should
25 guide, should I follow?

1 MR. McGOWAN: To the extent that -- Rule 26 is
2 the answer to the Court's question. To the extent the
3 common interest doctrine has been recognized and we're
4 dealing with a federal question case, then I think on work
5 product, it's always Rule 26.

6 THE COURT: Wait, wait, wait. So hold on.
7 We're not dealing with work product. I already ruled on
8 work product.

9 MR. McGOWAN: Right.

10 THE COURT: So we are only dealing with
11 privilege. All right? So what rule applies?

12 MR. McGOWAN: Okay. I apologize. When the
13 Court said privilege, so the rules that the Court would be
14 bound by I believe would be Third Circuit.

15 The rule --

16 THE COURT: When you say -- wait. When you say
17 rule of the Third Circuit, so when the Third Circuit
18 addresses a privilege, doesn't it look to the state law, the
19 state law privilege that's relevant?

20 MR. YOUNKIN: So it depends on the basis for
21 jurisdiction in my view, Your Honor.

22 So in a diversity case, for example,
23 attorney/client privilege with respect to causes of action
24 grounded in state law would be governed by state law. With
25 respect to work product, state law is not relevant because

1 it's a rule of civil procedure, and under the Erie doctrine,
2 the Federal Rules govern.

3 THE COURT: But we're not dealing with work
4 product. Right? I only have a brain, I've got a limited
5 brain. I'm not as smart as you guys. The reason why I'm
6 bringing up work product, I lose track of things. I'm only
7 interested in this issue and no one briefed this.

8 So let help out again with --

9 MR. YOUNKIN: Sure.

10 THE COURT: -- when I'm making a privilege call
11 in a patent case in the Third Circuit, does it matter
12 whether the lawyers are from one jurisdiction or another?
13 Does it matter -- you tell me. How do I figure out, because
14 the states have different views about what's privileged or
15 not. Correct?

16 MR. YOUNKIN: I agree with that, Your Honor, and
17 I don't want to repeat the Rule 26 phrase if I can call it
18 that because I don't want to sidetrack this discussion.

19 The common interest doctrine is not an
20 independent privilege. It is an anti-waiver rule. So if
21 the question is how does the common interest doctrine relate
22 to some underlying privilege against disclosure, then the
23 answer to what law the Court looks to depends on the basis
24 of jurisdiction. In a patent case, we don't need to worry
25 about that. It's a federal question.

1 The common interest doctrine is largely federal
2 common law, which I understand is not supposed to exist, the
3 Erie case, but it has been absorbed out of the criminal
4 cases starting with joint defense and it has now become a
5 case law doctrine.

6 So the answer to the Court's question, the
7 exception is a federal case law exception, the underlying
8 privileges or protections against disclosure are Rule 26 in
9 this case, because I don't believe there has been an
10 attorney/client privilege argument in this case and we can
11 set that aside.

12 You were correct, if it were attorney/client
13 privilege, then you would have to look to see if it's
14 diversity or federal question, then federal question would
15 be under the rules and would probably absorb common law of
16 the state in which the communication was made, but that's
17 not important to the Court's decision here, I don't think.

18 THE COURT: What --

19 MR. McGOWAN: So if I can --

20 THE COURT: Go ahead.

21 MR. McGOWAN: So if I can respond on the common
22 interest question, I don't think that we're asking for a
23 ruling of the breadth that counsel just described and I also
24 don't think the Hewlett-Packard case is the font of all
25 knowledge.

1 This Court, the District of Delaware,
2 established the rule applied in Hewlett-Packard in the
3 Union Carbide case with reference to protective shield
4 in cases such as co-defendants or anticipated joint
5 litigation.

6 Hewlett-Packard has a broad policy discussion of
7 how important it is for business deals to get done, but its
8 very specific holding tracked the Union Carbide case. And
9 in the Hewlett-Packard case, the issue was sale of a
10 division where the seller had been practicing the patent for
11 the sale and the buyer was going to practice after the sale,
12 so in all likelihood they would have wound up on the same
13 caption as defendants with respect to different periods of
14 time.

15 The Sealed Air case, when it goes back to
16 Hewlett-Packard and reads it, also applied the joint
17 litigation test that goes back to this Court's 1985 ruling
18 in Union Carbide.

19 And our point is then the Sealed Air case is a
20 successor liability case. It's a little unusual because the
21 parties were worried that the transaction itself was going
22 to be a fraudulent transfer of assets, but the Court made
23 very clear that the liability of the seller and the buyer
24 was the same liability.

25 So using the Union Carbide rule and its whole

1 stars of co-defendants for joint litigation, that's what the
2 case is recognizing a common interest against Lozier turned
3 on.

4 The reason I mentioned the stock acquisition is
5 acquiring even a hundred percent of the stock of a company
6 doesn't really matter, doesn't put the buyer on the same
7 caption. It gives it an economic interest in the company
8 whose assets it holds, but I've not heard Celsee suggest
9 that Celsee has been merged into Bio-Rad so that it's now
10 Bio-Rad. I haven't heard it suggested that it's no longer a
11 standalone company. What has been suggested I believe is
12 that its stock is now owned by somebody else. That's not
13 Hewlett-Packard, Sealed Air, and it's not the Union Carbide
14 test.

15 So I don't think that there needs to be any
16 broad ruling or very general statement about the common
17 interest doctrine. If we just follow the actual facts and
18 holdings of the cases and bring it back to its origin, I
19 think that that doctrine doesn't apply in this circumstance.

20 THE COURT: Okay.

21 MR. YOUNKIN: If I may, Your Honor, I need to
22 point out --

23 THE COURT: No. Go ahead. I think that the
24 challenge for you is that Union Carbide addressed a
25 situation where there was, where both parties were likely to

1 be involved in what the Court called "anticipated joint
2 litigation," and we don't have that here, do we?

3 MR. YOUNKIN: Well, what we have here is a
4 company that is the -- that now owns, 100 percent owns a
5 party to litigation. And I don't think that there's
6 anything in the case law that suggests that this question
7 turns on whether or not post acquisition the acquiring
8 company is going to be added as a named defendant in the
9 case. I think that that is a much too narrow reading of
10 these cases and it's not what they argued.

11 I mean, what they argued to the Judge, to
12 Magistrate Judge Fallon, was Courts have widely rejected the
13 contention that a company and a potential purchaser who sat
14 on opposite sides of the bargaining table share a commonly
15 owned interest in contemplated or pending legal proceedings.
16 That was the argument they presented to her, and she said,
17 that's not correct. That's not correct under Sealed Air.
18 It's contrary to AgroFresh and it's contrary to the
19 Hewlett-Packard line of cases.

20 The cases that they cite are completely
21 different from our case. They cite a case where somebody
22 was going to buy a majority share of a company, just a
23 majority share, but that's just an investment.

24 When you buy 51 percent of a company, you might
25 have an economic interest, but that is completely different

1 from owning the company. You know, owning 100 percent of
2 it. It's a subsidiary at that point. Right?

3 And --

4 THE COURT: Yes, but I mean --

5 MR. YOUNKIN: The way the deal was structured --

6 THE COURT: Have you read Judge Chen's opinion
7 in Nidec? I mean, he really braces the history of the
8 common interest privilege, and one thing he points out is
9 that the parties have to have a joint legal interest and we
10 don't have that here. Right? There there's no joint legal
11 interest, is there? It's economic.

12 MR. YOUNKIN: Well, I think it's the same
13 interest you see in Sealed Air or you see in
14 Hewlett-Packard.

15 Nidec, all that was happening in Nidec was --

16 THE COURT: You know, you keep saying
17 Hewlett-Packard, and you say, oh, it's binding in Delaware.
18 I mean, Judge Chen didn't go with Hewlett-Packard. Right?

19 MR. YOUNKIN: I'm not suggesting --

20 THE COURT: A Delaware case, which is Union
21 Carbide, but even it's not binding. You know, why --

22 MR. YOUNKIN: I agree with you, Your Honor.

23 THE COURT: Yes. Why should I give more to
24 Hewlett-Packard than I give to Nidec?

25 MR. YOUNKIN: Well, I think for two reasons.

1 One, I think that Nidec is distinguishable
2 because there, you have a situation where an investment
3 group is trying to buy the majority stake of a company.
4 They are not going to own it. That's number one.

5 Number two, Hewlett-Packard has been -- has been
6 followed in the Sealed Air case out of New Jersey, and also,
7 you know, we think that it is the correct, it's the correct
8 decision.

9 But, you know, as I think we've been talking
10 about, I mean, what they tried to do in a very short letter
11 brief to the Magistrate Judge was get a ruling, and the
12 transcript is crystal clear on this. The Magistrate says,
13 the Magistrate asked them, if I find in your favor, won't
14 that mean that there's no common interest when there's
15 merger discussions? And the answer was, yes, I think that's
16 right.

17 And the Magistrate Judge said, I don't think
18 that is the law. And it's their burden now to come in and
19 say that she, that she, like, misapplies binding precedent.

20 And then they point to Nidec, which is a
21 factually distinguishable case out of the Northern District
22 of California.

23 THE COURT: All right. Anything else?

24 MR. MCGOWAN: I could comment further if the
25 Court wishes it.

1 THE COURT: No. You know, I had hoped this
2 argument would make it unnecessary for me to have to address
3 the legal issue, but I guess it doesn't look like I'm going
4 to be able to do that, and, frankly, it's going to take me a
5 little bit of time.

6 What I would like is, I'm going to give you
7 chance by next Wednesday to file a letter no more than
8 750 words to address what is the applicable law of privilege
9 to make the decision. You know, Mr. McGowan, you can answer
10 orally that question, but I think I wouldn't mind seeing
11 both parties respond to that.

12 Whether I might look to state law, federal law,
13 federal common law and also just to lay out how I make that
14 decision, what's a starting point for that decision, and
15 then what is the applicable privilege law and common
16 interest law. All right?

17 MR. YOUNKIN: You want both parties to submit on
18 the same day, Your Honor?

19 THE COURT: Yes. Why don't you do Wednesday at
20 noon, so you both have to do it at the same time. You know,
21 I think the unfortunate thing about this is, you know, you
22 guys have to keep going with the calendar here and I'm just
23 bothered because I still continue to think at the end of the
24 day, I doubt this has really much probative value and, you
25 know, I've got to spend -- we just have limited resources

1 and the cases are, I don't want to take the case off the
2 track its on as far as proceeding to trial in June, but
3 we'll just have to do what we do.

4 All right. Anything else from the plaintiff?

5 MR. McGOWAN: No. Thank you, Your Honor.

6 THE COURT: All right. Anything from the
7 defendant?

8 MR. YOUNKIN: No, Your Honor. Thank you.

9 THE COURT: Thanks, everybody. Bye-bye.

10 (Telephone conference concluded at 11:14 a.m.)

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EXHIBIT C

FILED UNDER SEAL

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

10x GENOMICS, INC.,)	
)	
Plaintiff,)	
)	C.A. No. 19-862-CFC-SRF
v.)	
)	FILED UNDER SEAL
CELSEE, INC.,)	
)	
Defendant.)	
)	

DECLARATION OF CHRISTIAN LAPOINTE
IN SUPPORT OF MOTION TO SEAL

I, Christian LaPointe, if called upon as a witness could competently testify to the facts set forth below:

1. From August 2019 to March 2020, I served (part-time) as General Counsel for Celsee, Inc. (“Celsee”). After Celsee was acquired by Bio-Rad Laboratories, Inc. (“Bio-Rad”) in April 2020, I continued to serve as (part-time) in-house counsel, under a contract with Bio-Rad, to provide legal services for Celsee in this litigation.

2. The agreement by which Bio-Rad acquired Celsee includes an escrow provision. The acquisition agreement, and the escrow provision contained therein, have not been made public.

3. [REDACTED]

[REDACTED]

[REDACTED]

I declare under the penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on November 20, 2020 at Boston, Massachusetts.

Dated: November 20, 2020

/s/ Christian LaPointe
Christian LaPointe

EXHIBIT D

FILED UNDER SEAL

REDACTED